UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 08-13555(JMP)

Case No. 08-01420(JMP)(SIPA)

- -x

In the Matter of:

LEHMAN BROTHERS HOLDINGS INC., et al.,

Debtors.

- -x

In the matter of:

LEHMAN BROTHERS INC.,

Debtor.

- -x

U.S. Bankruptcy Court

One Bowling Green

New York, New York

January 13, 2010

10:12 a.m.

B E F O R E:

HON. JAMES M. PECK

U.S. BANKRUPTCY JUDGE

DEBTORS' Motion Requesting Joint Administration of the Chapter 11 Cases of LB Somerset LLC and LB Preferred Somerset LLC

DEBTORS' Motion for a Determination That Certain Orders and Other Pleadings Entered or Filed in the Chapter 11 Cases of Affiliated Debtors be Made Applicable to the Chapter 11 Cases of LB Somerset LLC and LB Preferred

DEBTORS' Motion to Extend the Time to File LB Somerset LLC's and LB Preferred Somerset LLC's Schedules, Statements of Financial Affairs, and Related Documents

DEBTORS' Motion to Strike William Kuntz's Notice of Appeal of the Order Authorizing Lehman Commercial Paper Inc. to Purchase Fairpoint Participation

DEBTORS' Motion for Authorization and Approval of a Settlement Agreement With the Insolvency Administrator of Lehman Brothers Bankhaus AG (In Insolvenz)

MOTION of Merrill Lynch International for Relief From the Automatic Stay

LBHI's Motion for Authorization to Sell Certain Asset Backed-Securities and Related Relief

MOTION of Seattle Pacific University Compelling Lehman Brothers Special Financing Inc. to Assume or Reject Executory Contracts

LEHMAN Brothers Special Financing Inc.'s Motion to Strike Capital Automotive L.P.'s Objection to Debtors' Motion to Compel Performance

JOINT Motion of Sea Port Group Securities and Berner Kantonalbank to Deem Proofs of Claim to be Timely Filed by Securities Programs Bar Date

MOTION of the Debtors for Establishment of Procedures for the Debtors to Compromise and Settle Pre-Petition Claims Asserted by the Debtors Against Third Parties

DEBTORS' Motion for Approval of Claim Objection Procedures and Settlement Procedures

MOTION by Insolvency Administrator and Foreign Representative for Authorization to Enter Into and Approval of a Settlement Agreement With the Lehman Parties

THIRD Application of Hughes Hubbard & Reed, LLP for Allowance of Interim Compensation for Services Rendered and Reimbursement of Actual and Necessary Expenses Incurred from June 1, 2009 Through September 30, 2009

PRETRIAL CONFERENCE
Federal Home Loan Bank of Pittsburgh v. Lehman Brothers Holdings Inc., et al.,

MOTION of Tuxedo Reserve Owner LLC and Tuxedo TPA Owner LLC for an Order Compelling Actions by Debtors as Agent and Lender Under Loan Facility

DEBTORS' Motion to Compel Performance by AIG CDS, Inc. of its Obligations Under an Executory Contract and to Enforce the Automatic Stay

MOTION of Laurel Cove Development for an Order Directing Debtor to Assume or Reject an Executory Contract

MOTION of U.S. Bank National Association for Relief From the Automatic Stay

MOTION to Compel Performance of Capital Automotive L.P.'s Obligations Under an Executory Contract and to Enforce the Automatic Stay

MOTION of 1407 Broadway Real Estate LLC and PGRS 1407 BWAY LLC for an Order (I) Compelling Certain of the Debtors to Comply With Their Lending Obligations

NOTICE of Debtors' Objection to Proof of Claim Filed by David Schwartzman

MOTION of U.S. Bank National Association for Relief From Automatic Stay

MOTION of U.S. Bank National Association for Relief From Automatic Stay

MOTION of Property Asset Management Inc. for Relief From the Automatic Stay

MOTION of U.S. Bank National Association for Relief From the Automatic Stay

MOTION of Debtors to Compel Performance of Board of Education of the City of Chicago's Obligations Under an Executory Contract and to Enforce the Automatic Stay

MOTION of Official Committee of Unsecured Creditors for Reconsideration of Court's September 17, 2008 Interim Order Authorizing Debtor to Obtain Post-Petition Financing

MOTION of WWK Hawaii-Waikapuna, LLC, et al. for Relief From the Automatic Stay

FIRST Motion of Mark Glasser to Extend Time for Claim

MARKIT Group Limited's Motion for Relief from the Automatic Stay to Terminate Data Services Agreement and Associated Addenda

MOTION of Newport Global Opportunities Fund LP, Newport Global Credit Fund (Master) L.P., PEP Credit Investor and Providence TMT Special Situations Fund L.P. for Leave to Conduct Rule 2004 Discovery of Lehman Brothers Inc. and the SIPA Trustee

LEHMAN Brothers Special Financing Inc.'s Motion to Dismiss in Chicago Board of Education v. Lehman Brothers Special Financing Inc.

PRE-TRIAL Conferences

Lehman Brothers Holdings Inc. v. Barclays Capital, Inc.

James W. Giddens, as Trustee for the SIPA Liquidation of Lehman Brothers Inc. v. Barclays Capital Inc.

The Official Committee of Unsecured Creditors of Lehman Brothers Holdings Inc. v. Lehman Brothers Holdings Inc.

Berenshteyn v. Lehman Brothers Holdings Inc.

Lehman Brothers Special Financing, Inc. v. Metropolitan West Asset Management, et al.

Lehman Brothers Special Financing, Inc. v. Metropolitan West Asset Management, LLC, et al.

NOTICE of Hearing on Interim Applications for Allowance of Compensation for Professional Services Rendered and for Reimbursement of Actual and Necessary Expenses

DEBTORS' Motion to Strike William Kuntz's Notice of Appeal of Order Denying Relief Under Federal Rule of Civil Procedure 60(b) or, in the Alternative, to Dismiss William Kuntz's Appeal

MOTION of the Examiner to Compel ABN AMRO Inc. to Respond to Subpoena for Rule 2004 Examination

Transcribed by: Esther Accardi and Clara Rubin

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P R O C E E D I N G S

THE COURT: Please be seated. Good morning.

MR. WAISMAN: Good morning, Your Honor, and Happy New Year.

THE COURT: Happy New Year to you, too.

MR. WAISMAN: Shai Waisman, Weil Gotshal & Manges on behalf of the Lehman debtors.

Your Honor, we filed an agenda letter yesterday afternoon, which was supplemented by an amended agenda letter filed yesterday evening.

Notwithstanding that, we do have a request to take at least one matter out of order. And the first matter would be the LBI matter. LBI has only one matter on it's agenda, and that's the uncontested fee application of Hughes Hubbard. Because there's that uncontested matter, we would ask that -- LBI would ask that that lead off today's calendar and then get to the regular agenda, if that's okay with Your Honor.

THE COURT: That's fine.

MR. KOBAK: Thank you, Your Honor. Good morning. James Kobak, Hughes Hubbard & Reed, LLP on behalf of the SIPA Trustee. And thank you to Mr. Waisman and Mr. Krasnow for letting us go out of order.

Your Honor, I'll try to be brief, I hope this will be brief. We've submitted our application, this is for the third period for interim compensation. It's a period that runs from

June through September of last year, a four-month period. It was quite an active period in the case, with the claims process getting underway as well as a lot of activity on the transfer of accounts. Many other activities with disputes, which I think Your Honor is well aware of. We also spent considerable time starting up our investigation of the debtor, where we worked very closely in coordination with the examiner.

The total hours were somewhat over 56,000 hours, of which 600 -- something over 600 were billed by the trustee, himself, and the rest by me and other members of my firm.

As Mr. Waisman noted, there's no opposition to this application and SIPC has filed a statement in support. Which as you know, under the statute is entitled at least to considerable reliance.

I'll also note for the record, that our fees are subject to a fifteen percent holdback, which in this case amounts to several million dollars for this period.

As I think Your Honor knows, we also voluntarily extend a public service discount for this type of work, which is ten percent of our normal billing rates. And that amounts to almost two and a half million dollars.

In addition to that, SIPC, as you know, reviews the bills very carefully and we have written off several hundred thousand dollars of time and expenses voluntarily at their request.

So if Your Honor likes, I could go through much more detail of what we did, but I think that's all set forth in our application, and I know you have a busy schedule today.

THE COURT: There's no need to go through the application on the record, at this point. And I have reviewed the application and the submission from Josephine Wang in support of your application, which included references to various adjustments made in the fees, including one that I found a little obscure relating to something that was an adjustment to your fees that should have been an adjustment to expenses.

MR. KOBAK: To expenses.

THE COURT: Maybe it was the other way around?

MR. KOBAK: No, it was -- we took it out of fees but it was -- I think it was an adjustment to expenses.

THE COURT: I think we may be equally confused about what that adjustment was.

MR. KOBAK: It wasn't very significant in dollar amount.

THE COURT: I think there was an adjustment and I recognize that it was a downward adjustment, and that's fine. I'm pleased to approve the application in the form that it was presented.

MR. KOBAK: Thank you, Your Honor, we'll submit an order at the end of the hearing. And if we could indulge you

if Mr. Caputo and I could be excused.

THE COURT: I think that's wonderful because you'll save fees for the next application.

MR. KOBAK: Right. Thank you, Your Honor.

MR. WAISMAN: Your Honor, the next three matters on the calendar, we would actually go back to the agenda letter filed last night, and these would be the first three uncontested matters.

Shortly before the holidays, Your Honor, on December 21st, the debtors were compelled to commence two additional Chapter 11 cases. Those are for two entities; the LB Somerset LLC entity, and the LB Preferred Somerset LLC entity.

Your Honor, these two entities, their primary business is membership interest in a joint venture that owns six office buildings in Raleigh, North Carolina. Disputes have arisen between these two members and their joint venture partners, and litigation was instituted -- initiated in the Delaware Chancery Court in December by the joint venture partner against these two Lehman affiliated entities, seeking among other things, really a forfeiture of many of their rights under the membership joint venture agreement.

Given limited resources of these two entities, the expense of a litigation and the risk of a forfeiture, these entities really had no choice but to commence these two cases.

The three uncontested matters are the joint admin

motion, which would seek to jointly administer for administrative purposes only. These two estates, with the rest of the Lehman entities, what we commonly call the all orders motion, which seeks to apply many of the orders that this Court has entered to the other debtors, to these two new cases. And, finally, an extension of time to file schedules and statements. And the extension here would be to February 3, 2010.

The debtors are working on preparing those schedules. The holidays and New Year posed a bit of a challenge and that was the reason for the request for the extension. But we do believe the extension would permit us to file the schedules by the period sought.

I'm happy to answer any questions Your Honor may have, otherwise we would ask that the relief in those three motions be granted.

THE COURT: The relief is granted as to all three motions.

MR. WAISMAN: Thank you, Your Honor.

Item 4 on the agenda, Your Honor, is the debtors' motion to strike William Kuntz' notice of appeal of the order authorizing Lehman Commercial Paper to purchase Fairpoint Participation.

Your Honor entered an order on October 16th permitting the debtors to purchase a participation in a Fairpoint loan. Mr. Kuntz untimely filed a motion to extend the time to appeal.

That motion was filed on October 27th, again, untimely, never prosecuted. And a little more -- over a month after that a notice of appeal was filed.

The appeal has been assigned to District Judge Barbara Jones. Subsequently, on December 28th, Mr. Kuntz sent a letter to the District Court withdrawing his appeal. The District Court has not acted on that letter, this motion was already filed, already scheduled to be heard today. And given some of the history here the debtors would -- and the fact that the appeal still appears pending on the District Court's docket, would continue to prosecute this motion.

If Your Honor would like I'm happy to hand up the submission by Mr. Kuntz to the District Court withdrawing his appeal.

THE COURT: I've already seen it. I saw it on the electronic docket.

MR. WAISMAN: With that, unless Your Honor has any questions, we would ask the relief be granted.

THE COURT: I believe I see Mr. Kuntz in Court, am I right?

MR. KUNTZ: That's correct, Your Honor. And the notice was filed with the Bankruptcy Court, not the District Court. So I --

THE COURT: All right.

MR. KUNTZ: All I can say is that they're spinning

their wheels with you.

THE COURT: Mr. Kuntz, I don't know if what you've said has been picked up on the record. And I don't know if you want it to be. But it may be just as well for purposes of completion that you come forward, at least --

MR. KUNTZ: I have no desire to come forward, Your Honor. The notice was filed in December, the debtors' attorney --

THE COURT: Mr. Kuntz, what I'm trying to explain to you --

MR. KUNTZ: I understand, Your Honor. The answer is no. You can elaborate all you wish from the bench.

MR. WAISMAN: Your Honor, for the record --

THE COURT: Just so I'm trying -- I'm just trying to get something established for the record. I have no idea whether or not what Mr. Kuntz said from the gallery, because he's about six rows back, was picked up by the recording equipment. And so my concern has absolutely nothing to do with anything that Mr. Kuntz is presently saying, as much as whether or not it's being recorded. And so this little aside is purely about the integrity of the record at today's proceedings.

So my question, Mr. Kuntz, is whether you would like to come forward simply --

MR. KUNTZ: Could we put this over to February, Your Honor?

THE COURT: No. The question is whether you would like to come forward so that you can be heard. If you don't want to come forward, that's fine, in which case you don't need to say anything. But if you're going to say something in this Court it's going to be recorded as part of the official record, it's not going to be a catcall from the audience.

Do you or do you not consent to the striking of your notice of appeal?

MR. KUNTZ: Your Honor, I already dismissed the notice of appeal and I have a copy, and it was sent certified mail to the clerk.

THE COURT: I don't care what piece of paper you have. Do you or do you not consent --

MR. KUNTZ: It's already been dismissed.

THE COURT: Do you --

MR. KUNTZ: No, I do not consent, because it's already been dismissed as far as I'm concerned.

THE COURT: Well, as far as you're concerned is different from what the record reflects.

MR. KUNTZ: That's fine, Your Honor. You go ahead and rule any way you wish. I decided after evaluating the situation, I thought the investment was risky. I don't believe the business rule applies for investing estate funds. I thought a prudent man rule or a very prudent man rule should apply.

The creditors' committee made no objection and it seemed to me related to my small interest in this estate, it was basically a non-starter.

THE COURT: Is it your present intention to withdraw your appeal as it relates to this matter?

MR. KUNTZ: Yes.

THE COURT: Fine.

MR. KUNTZ: Thank you, Your Honor.

THE COURT: Thank you very much. The motion to strike is granted, both on the basis of the allegations in the motion and Mr. Kuntz' acknowledgement that he has no intention at this point to prosecute the appeal.

MR. WAISMAN: Thank you, Your Honor. I would turn the podium over to Mr. Krasnow.

MR. KRASNOW: Good morning, Your Honor. Richard Krasnow, Weil Gotshal & Manges on behalf of the Chapter 11 debtors.

Your Honor, the next item on the uncontested portion of the calendar is the debtors' motion for authorization and approval of a settlement agreement which does go beyond mere settlement of disputes with the insolvency administrator of Lehman Brothers Bankhaus AG, that is a Lehman Bank which is an insolvency proceeding in Germany.

Your Honor, there is a companion motion that was filed by the administrator in connection with its -- or his pending

Chapter 15 case, which is before this Court. And with the Court's permission I would suggest that following our presentation with respect to the debtors' motion, it might make sense to take that item, which is number 13 on the agenda, immediately following. They are parallel proceedings.

THE COURT: It seems to me that we should here them in tandem.

MR. KRASNOW: Very well, Your Honor.

Your Honor, the motion currently before the Court in the Chapter 11 cases is probably -- would probably be viewed in an ordinary Chapter 11 case as somewhat extraordinary. And it's probably even unusual in the context of this extraordinary Chapter 11 case that is currently before the Court in the form of Lehman Brothers.

What this agreement contemplates and provides for is, both resolutions of disputes with respect to certain loans, as well as the acquisition of certain loans. All of which would be reflected in a transaction pursuant to which the Lehman parties, which would include two Chapter 11 debtors; LBHI and LCPI, paying to the administrator on a net-net basis, that is after taking into account cash that is supposed to move back and force, but netting that, if you will, from the purchase price. A payment to the administrator of approximately one billion dollars, and the receipt by the Lehman parties, which include those two Chapter 11 debtors and a non-debtor; Lehman

non-debtor, Lehman ALI, that's A-L-I, of commercial loans and real estate loans which have an aggregate outstanding principal balance of in excess of three billion dollars and which have a value, in our view, of in excess of two billion dollars. Large sums, Your Honor, that's why I characterize this as somewhat extraordinary. But what is interesting, Your Honor, is as one looks through the docket there are no objections to this transaction.

There was one formal objection that was, indeed, filed, I would style that objection as one really asking for information, which was supplied and which resulted in that objection being withdrawn. There was an informal inquiry made by a party which did not culminate in an objection, but rather in a revision to the proposed order, which reflects that if Your Honor were to approve these transactions it would be without prejudice to their interests, and two other documents which were filed; one by the creditors' committee and one yesterday by the ad hoc committee, both of which support this transaction -- or these transactions.

Your Honor, in light of the fact that there are no objections, but, nonetheless, at least in our view, and we assume the Court's view, that given the size of these transactions perhaps there ought to be more of a record than simply the filing of an application. In lieu of my summarizing the motion, and the events, and the agreement, what I would

propose, with the Court's permission, is to make a proffer of the testimony of the Mr. Daniel Ehrman. Mr. Ehrman is in Court today. Mr. Ehrman is a managing director at Alvarez & Marsal. He's also an officer of various of the Chapter 11 debtors. And he was, in fact, the lead negotiator with the administrator, Dr. Frege, who I believe is also in the courtroom, in connection with his application for approval of this transaction in the Chapter 15 case. And I would offer his proffer in lieu of my summary in support of the motion, if that's acceptable, Your Honor.

THE COURT: That's perfectly acceptable.

MR. KRASNOW: Your Honor, pursuant to Rule 102 of the Federal Rules of Evidence, I offer as a proffer the testimony that would be given by Mr. Daniel Ehrman, a managing director of Alvarez & Marsal. As I noted, Your Honor, Mr. Ehrman is in Court today and he's available for cross-examination.

Your Honor, if called to testify, Mr. Ehrman would testify as follows:

Mr. Ehrman would testify that he is a managing director with Alvarez & Marsal, or A&M. And was assigned to the Lehman matter in September of 2008. His primary areas of responsibilities include managing all international and foreign matters of the debtors, and, also, managing and overseeing the debtors' derivative transactions.

Mr. Ehrman began his professional career as an

attorney practicing law in France for five years. He has specialized in turnaround and restructurings with A&M for more than eight years, serving in a variety of interim management advisory and financial restructuring roles.

On behalf of the Lehman debtors Mr. Ehrman led the negotiations with the administrator that resulted in the settlement agreement that is the subject of today's hearing. A copy of which agreement is attached to the debtors' motion.

Prior to its filing he also reviewed and approved the debtors' motion seeking approval of the agreement, and the settlement and the transactions provided for in the agreement, and adopts the representations contained in the motion.

Mr. Ehrman would testify that he first became involved with Bankhaus soon after the commencement of these Chapter 11 cases, participating in discussions through the months of October and November of 2008 with respect to a potential transaction, that if successful might have avoided the Bankhaus insolvency proceedings. In those discussions he became familiar with various of Bankhaus assets and in particular with the loans on Bankhaus' books that had been the subject of participation with other Lehman entities.

While a Bankhaus insolvency could not be avoided, Mr. Ehrman continued to focus on the loans, and in particular, on a category of loans referred to in the motion and the agreement as category 1 loans. In light of the intercompany claims that

the debtors and Bankhaus have against each other and the relationships between the debtors and Bankhaus with respect to the participated loans.

Mr. Ehrman would testify that the participations generally appear in two forms. As to both forms, the participations are structured with a named stated lender who participates out all or a portion of the loan to a third-party. One form of participation is generally referred to, at least at Lehman, as U.S.-style, while the other form is generally referred to as U.K.-style.

Generally and U.K.-style participation, the named stated lender, has a legal and beneficial interest in the loan, itself. The participant, therefore, has a debtor/creditor relationship with the named lender as to any claims that it has for monies received by the lender from the borrower.

In a U.S.-style participation, on the other hand, the named lender is really only a nominal lender and beneficial rights lie with the participant.

Mr. Ehrman would testify that it is his understanding that the named lender in the case of U.S.-style participations has only bear legal title and that the essential difference between the two forms of participations, is that the risks, exposure and liability with respect to the loans in a U.S.-style participation are borne by the participation. Where under a U.K.-style participation, it is the named lender that

bears the risk associated with and thus has the ownership of the participated loans.

Mr. Ehrman would testify that it is his understanding that although the category loans have many characteristics associated with the U.S.-style of participations, they arguably could be characterized as U.K.-style participations. In which case all ownership rights would reside with the named Lehman lender.

He understands, that among other reasons, this is because on or about August 15, 2002, LBHI and Bankhaus entered into a security and collaborative agreement that generally required LBHI to make payments to Bankhaus to the extent that Bankhaus had to write down or mark down asset fields of values including loans.

He further understands that to the extent that the security and collateral agreement could be viewed as a guarantee, it would shift the risks associated with the loans to LBHI, which arguably could result in the recharacterization and/or treatment of the category loans as U.K.-style and not U.S.-style participations, such that the debtors and other lenders would have all entitlements with respect to those loans. And Bankhaus would have only an unsecured claim against the debtors and other lenders for the amount due it under the participations.

The category 1 loan participations, therefore,

presented litigable issues concerning the true ownership of those loans, and thus, an opportunity for the debtors to engage in discussions with the administrator regarding the ownership of these loans. While there were some discussions with Bankhaus' insolvency administrator, they're in the first four to five months of 2001 regarding the category 1 loan participations. It was in or about June 2009 that substantive discussions began regarding a potential resolution of the status of these loans. These discussions also expanded to include discussions regarding other participated loans where Bankhaus was the stated lender. These more substantive discussions extended from June or July of 2009 until almost the date prior to the execution of the agreement.

Mr. Ehrman would testify that the parties concluded that the best way to resolve the uncertainty over the ownership of category 1 loans, was for the Lehman parties to acquire the category 1 loans, of which there are approximately eighty-six with a total outstanding balance due of approximately 2.9 billion. For an appropriate purchase price that would account for the litigation risks attendant to resolving the dispute and the commercial risk attended to collection of the amounts due under the loans. The parties agreed on what is referred to in the agreement as an applicable value that refers to the status of the loans, the anticipated collections on the loans, the present value of payments to be made on the loans. Some might

say market value, I'm not sure it's reflective of market value, Your Honor, but the value.

Mr. Ehrman would testify that the valuation of the real estate loans was undertaken by Lehman's real estate team, that it's managing Lehman's real estate portfolio and entailed a loan-by-loan review that included cash flow analysis and present value discounting.

Commercial loan values were developed by Lehman's commercial loan team that is managing Lehman's commercial loans and entailed an evaluation of market trading values associated with these loans. These values were reviewed by and agreed to by the administrator and Lehman.

A discount of these values was then negotiated at sixty percent of applicable value, or a forty percent discount and the agreed purchase price with respect to the category 1 loans.

Mr. Ehrman would testify that during the negotiations and as part of the overall resolution between the debtors and the administrator, the administrator indicated that he also wanted to include Lehman's acquisition of what is referred to in the agreement and the motion as category 2 and category 4 loans where Bankhaus is the named lender.

Notwithstanding the fact that these loans are not subject to any litigation issues, the inclusion of the category 2 loans of which there are approximately five, which have or

had total outstanding principal amounts due of approximately eighty-seven million dollars, and the category four loans of which there are approximately twenty-four with a total outstanding principal balance due of approximately 481 million dollars represented a potential pure acquisition, which Mr. Ehrman would testify, the debtors concluded would be appropriate if they were appropriate discounts, since it would afford to the estates an opportunity to realize significant and substantial value.

In that regard Mr. Ehrman would testify that the agreement provides that there is an agreed applicable amount as with the category 1 loans, and purchase price of essentially as to the category 4 loans, eighty percent of that value, or a discount of twenty percent. The formula with respect to the category 2 loans is characterized somewhat differently but essentially results in the same formulation.

Mr. Ehrman would testify that the difference between the discount factors of the category 1 and 4 loans, a forty percent versus twenty percent, is attributable to the litigation risk relating to the category 1 loans that don't exist with respect to the category 4 loans.

Mr. Ehrman would further testify that there are various other material terms and conditions of the agreement relating to, among other things, indemnities, releases and agreements as to certain claim amounts. Based upon his review

of the agreement and the motion, he believes that those material terms and conditions are accurately summarized in the motion.

Mr. Ehrman would note that the agreement upon amounts of the Bankhaus claims, that I've alluded to, against certain of the Chapter 11 debtors, relate to category 3 loans. Which are loans where a Lehman party has all of the ownership rights with respect to the loans and Bankhaus only has unsecured claims against the named lender for amounts due to it as a participant. And unsecured claims against LBHI under the security and collateral agreement.

Under the settlement agreement the administrator is to be granted a non-priority general unsecured claim against LCPI in the amount of approximately one billion dollars, which is an amount net of certain amounts owed to LCPI with respect to certain category 2 and category 4 loans.

The administrator will also be granted a non-priority general unsecured claim against LBHI under the security and collateral agreement relating to the category 3 loans and one other loan in the gross amount of approximately 1.38 billion dollars less any distributions that he receives with respect to the allowed claim against LCPI.

Mr. Ehrman would note that his testimony regarding the terms of the agreement represents a summary of those terms, and that to the extent there's any inadvertent inconsistency with

the summary and the terms of the agreement, it is the agreement that controls.

Mr. Ehrman would testify that subsequent to the execution of the agreement, the agreement was modified or amended by a consent document dated December 18, 2008 and a letter agreement dated January 8, 2009, both of which were filed with the Court on January 8, 2009.

Mr. Ehrman would further testify --

THE COURT: I think you mean 2010.

MR. KRASNOW: I'm sorry, Your Honor.

Mr. Ehrman would correct his testimony and note it was 2010.

Mr. Ehrman would further testify that he understands that both of these documents were reviewed by the creditors' committee and they have no objection to them. He understands that both documents take into account the fact that significant principal payments were made on the affected loans, the loans referred to in those documents. And with respect to certain category 2 loans, full principal payments were made by borrowers which are to be acquired by the relevant Lehman party. Both the Lehman parties and the Bankhaus administrator determined that these circumstances warranted modifications to the agreements such that as to one loan the purchase price to be paid would be reduced, and as to others, the amount of cash to be received by the Lehman parties would be increased.

In sum, Your Honor, these amendments are favorable to the debtors and the other Lehman parties.

If the motion is granted the Lehman parties will make a net payment to the administrator of approximately 1.388 billion dollars. Again, Your Honor, that's a gross number, if you will.

If a closing as to all the loans takes place, this amount which is subject to adjustments as provided for in the agreement includes payment for cash held by the administrator that will be transferred to or retained by the Lehman parties such that if this account is accounted for the net-net payment to the administrator will approximately be one billion dollars. Again, subject to adjustments.

Payments for loan in cash will be made with respect to loans that have an aggregate applicable value of approximately 2. billion dollars inclusive of approximate 442 million dollars of cash. Using October and November numbers to the cash collections as of that, all of which would be transferred to the appropriate Lehman parties.

Mr. Ehrman would testify while there -- there can be no certainty as to the actual amounts that will be realized on these loans, the debtors believe that based on their analysis and their business judgment, it is reasonable to anticipate that the Lehman parties will recover substantial amounts, significantly in excess of the purchase price.

Mr. Ehrman would note that the motion does include an illustrative example of an allocation of the purchase price amongst the three Lehman parties. That would be, Your Honor, LBHI paying a purchase price of approximately 158 million dollars. LCPI paying a purchase price of approximately 1.2 billion dollars. And Lehman ALI paying a purchase price of approximately 48.4 million dollars. However, the allocation of certain loans have not been finalized particularly as between LCPI and LBHI and, therefore, there could be adjustments as to which of those entities would actually own certain loans and, therefore, which of those entities will be paying the purchase price applicable to those loans.

Mr. Ehrman would testify that based on discussions with the debtors' counsel it his understanding that many of the litigation issues and claims that would be made concerning the nature of the category 1 loan participations are somewhat novel in nature and the results are highly uncertain. To a significant extent, the debtors' success in litigating with respect to the categorization of the category 1 line participations would turn on determinations that the security and collateral agreement with LBHI was a guarantee and that those Lehman parties, other than LBHI who are the named lenders under certain loans were, themselves, deemed to be at risk with respect to the loans, that they had participated to Bankhaus even though they aren't parties to the security and collateral

agreement, which naturally could raise potential mutuality issues.

Mr. Ehrman would testify that it is clear that these issues would be highly contested and the results of any litigation would be far from certain. The only certainty being protracted litigation at great costs and with risks that while the parties were fighting about who owned the loans, no one would be devoting the necessary resources to managing the loans and maximizing their value.

Mr. Ehrman would testify that it his view that the forty percent discount against applicable value of category 1 loans more than adequately takes these risks into account and is more than reasonable.

Mr. Ehrman would also testify that the debtors believe that their decision to acquire all of the loans covered by the agreement, taking into account the potential significant total recoveries that they might realize on these loans even given the collection risks inherent in any loan at the discounts provided for in the agreement, represents an exercise of prudent business judgment. In that regard Mr. Ehrman would note that no creditors have challenged the debtors' business judgment, and the creditors' committee, which was kept abreast of the negotiations and undertook its own analysis of the transactions, supports the debtors' motion.

In conclusion, Mr. Ehrman would testify that in light

of all of this, the debtors believe that the agreement is in the best interest of their estates and creditors and should be approved.

Your Honor, that would conclude Mr. Ehrman's proffer.

THE COURT: Is there any party who would wish to cross-examine Mr. Ehrman with respect to the proffer? I hear no such request I accept the proffer as the functional equivalent of live testimony by Mr. Ehrman who is in Court.

MR. KRASNOW: Thank you, Your Honor. Your Honor, based upon the proffer, the motion -- the amendments to the agreement that have been filed with the Court, the statements in support, we would respectfully request that the Court approve the motion, approve the settlement agreement and all of the transactions contemplated by that agreement.

THE COURT: All right. I note that there are statements that have been made by, both the creditors' committee and the ad hoc group of creditors in support of this. I'll just ask whether there's any desire for comment before I rule with respect to the motion? Apparently not.

I've read the motion and I appreciate being informed further by means of the offer of proof of Mr. Ehrman's testimony concerning the business judgment, which underlies the transaction which has been characterized by counsel as unusual and which I view as unusual myself, independently.

One of the more unusual aspects of the transaction is

that it involves a very significant acquisition of financial assets as a means to, both resolve litigation risk and to potentially realize gain. In light of the fact that the creditor constituencies that have observed this and who have studied it support the transaction and in light of the fact that Mr. Ehrman of Alvarez & Marsal has dedicated significant personal time and attention to analyzing the risks and rewards of the transaction, I'm satisfied that this represents a prudent exercise of the debtors' business judgment. And significantly reduces litigation risk.

Under the circumstances, I'm pleased to approve the motion as presented.

MR. KRASNOW: Thank you, Your Honor. Your Honor, we had filed with the Court, I believe yesterday, a blackline of a revised form of order which took into account, among other things, the resolution of some issues that had been raised by a party who had not filed an objection, that just without prejudice language. That revised proposed order was reviewed by the administrators counsel and the committee and they have no objection.

Subsequent to that, in reviewing the order, we caught a typo. The decretal paragraph in question we think clearly authorizes the debtors to proceed with the transaction, but there was a word missing "authorize" and so the order has been further revised. That has been reviewed by, both the committee

and the administrator, and we would propose, Your Honor, at the conclusion of today's hearings to provide that with the Court.

THE COURT: Fine.

MR. KRASNOW: I think, Your Honor, at this point it's probably appropriate to turn over the rostrum to the administrator's counsel.

THE COURT: Very well.

MR. YATES: Good morning, Your Honor. Farrington Yates with Sonnenschein on behalf of Dr. Michael C. Frege, the insolvency administrator for Lehman Brothers Bankhaus AG, and insolvents.

And as Mr. Krasnow noted we had also filed in our Chapter 15 proceeding a parallel motion to approve the settlement agreement as some of the assets that were included and affected by the settlement agreement were located within the territory of the United States.

I have with me Mr. Frege.

DR. FREGE: Good morning.

MR. YATES: As by way of background, Your Honor, as the Court may recall, on April 29th Dr. Frege filed the petition for recognition under Chapter 15 with this Court. And on May 22, 2009 the Court entered the order granting recognition to Dr. Frege as the foreign representative. And also recognizing the Bankhaus insolvency proceedings in Germany as a foreign-named proceeding. And with respect to that

particular recognition order, so far we were able to work through a number of issues with respect to administering the estate. And that -- one of them is the settlement agreement and that's one of the reasons why we're here.

Our parallel motion is to seek approval of the settlement under Section 363 of the Bankruptcy Code as incorporated by Sections 1520 of the Bankruptcy Code, as I said, because the settlement involves U.S. assets of Bankhaus.

With respect to the motion in the Chapter 15 proceeding, we provided notice to all of the parties that were to be given notice in the Chapter 15 proceeding. We refer to that as the notice parties. And also because of the notice that was given in the LBHI case, generally, we believe that any party that has any interest in being heard today has had the opportunity to understand the motion and the impact. And in the Chapter 15 proceeding, as Mr. Krasnow had mentioned in the LBHI proceeding, no objections have been filed.

The motion essentially requests approval of the settlement from the Bankhaus perspective. And in that light, Mr. Frege believes that the settlement -- I'm sorry, Dr. Frege believes that the settlement demonstrates an exercise of his sound business judgment as the insolvency administrator of the Bankhaus estate. And that the settlement is in the best interest of the creditors of the Bankhaus estate, is fair and equitable and is within a range of litigated outcomes in the

event that, in fact, the issues were litigated.

As Mr. Krasnow spent some time and also with the proffer of Mr. Ehrman's testimony, outlining the settlement terms and conditions, I won't belabor the points or try to get through and summarize them again, so that we won't waste time.

Dr. Frege was involved personally in the negotiations with respect to this settlement agreement. And settlement negotiations were extensive and they were at arms length, and this agreement was heavily negotiated.

However, notwithstanding that there were extensive negotiations, he does believe that the settlement discharges his duty as an insolvency administrator for the German estate to liquidate assets in a commercially reasonable way. And that is essentially the standard by which he has held in Germany.

Now, in the exercise of his judgment and with respect to entering into the settlement agreement, he also evaluated the litigation risks. And as Mr. Krasnow described to the Court, there is significant risk with respect to the characterization of these loans and participation interest. And the issues were novel, and, again, if there was litigation it would be protracted and costly.

And so in light of the dispute on the merits and in light of the timing, as far as how long it might take in order to resolve these issues, Dr. Frege evaluated these points among others in deciding to enter into the settlement agreement.

As Mr. Krasnow had referenced, the length of time with respect to litigation who would administer the assets during the dispute, that was also an issue. Also the value of the assets might change over a period of time. And, also, there was a potential for exchange rate and currency risks from the German perspective. And, so, with respect to the settlement the benefits to the Bankhaus estate include the following:

Essentially it yields now money and it monetizes assets so that Dr. Frege can then take the money and make distributions to creditors in Germany. Because there is -- the assets are being monetized now as opposed to sometime in the future, there is also time value to having the money delivered to the estate now as opposed to ten years from now at the end of any sort of protracted litigation.

The Lehman parties will take these assets. And so they will take on the risk of these assets. As far as the valuation going up and down, whether they can be administered, if there's going to be any collection risks, et cetera. And so from the Bankhaus perspective that was a positive to entering into this agreement, it transfer the risk of ownership to the Lehman parties.

As Mr. Krasnow also mentioned, Bankhaus receives substantial allowed general unsecured claims against certain Lehman entities. And, again, as opposed to litigating those issues with respect to guarantee, whether they're not

guarantee, whether the security and collateral agreement has the effect that Mr. Krasnow suggested, these are all issues that could be litigated but they're resolved pursuant to the settlement agreement.

So, overall, we believe and Dr. Frege agrees, that this settlement agreement is also in the best interest of the Bankhaus creditors.

With respect to creditor approval, there's a creditors assembly in Germany and a creditors' committee, which is a smaller subset. Both have vetted this settlement agreement, and both have approved it. Now, as Mr. Krasnow mentioned with this last minute letter agreement and consent that was filed earlier in the week, Dr. Frege needs to go back to the creditor committee, he will do so after this hearing. And assuming that the motion is approved confirm with them and then proceed to closing. And all of this is provided for in the agreement. So from his perspective as far as the overall construct of the settlement agreement, et cetera, it's been approved by creditors in Germany. And under German law there's no German court that has to approve this settlement, it's really only done in material matters, the administrator is instructed to consult with creditors; the credit assembly and the creditor committee, before taking material lapse, and as I've mentioned he is about to.

I also have a proffer of Dr. Frege.

THE COURT: It sounds as if you've already given it.

MR. YATES: Well, if you want for me to proceed that way we can certainly do so.

THE COURT: No, it's fine, I'm happy to hear your proffer. But note that I've already heard quite a lot about what I assume will be the substance of the proffer by virtue of the presentation you've already made.

MR. YATES: I think you're right, Your Honor.

I'll proffer as follows:

This proffer will serve as the testimony of Dr. Frege. If he were to take the stand and to testify, he is present here in the courtroom, and if so, taking the stand would testify as follows:

I am Michael C. Frege. I am the court appointed insolvency administrator for Lehman Brothers Bankhaus AG, which is In Insolvenz proceedings in Germany.

I've been an insolvency administrator for over twenty years. I have a degree in law and also a doctoral degree, hence Dr. Frege.

He is a member of a number of professional organizations in Germany with respect to insolvency and also has a number of certifications as an insolvency practitioner in Germany.

He is a published author and has published the leading treatise on German insolvency law and practice, and he is also

a mediator.

He has been involved in over 800 insolvency proceedings in German.

Under German insolvency law the insolvency proceeding in which Bankhaus is subject the purpose of it is to liquidate assets. And German authority permits and authorizes the insolvency administrator to liquidate assets in the best commercial way and within the exercise of his discretion.

I am very familiar with the settlement agreement. I directed the negotiations from the Bankhaus side and was personally involved. I've heard the description of the settlement agreement from Mr. Ehrman and would concur with his description.

And I would, in my view, the settlement agreement as described previously impacts U.S. assets of Bankhaus located here, within the territory of the United States.

And the settlement agreement was negotiated extensively and over an extended period of time.

In my view, the settlement is in the best interest of the Bankhaus estate. The dispute involving the litigation risks described with respect to loans versus participation and in characterization and the owners of each presented a risk that would be litigated if not settled. If litigated in my view the litigation would be protracted and costly. During that time, because neither party would have ownership, per se,

to these assets, neither party; the Lehman parties nor Bankhaus, would be administering those assets.

The settlement agreement offers an opportunity to monetize these assets now, which is consistent with my mandate under German law. The result yields settlement -- yields certainty and it also yields immediate cash. That immediate cash has a value now as opposed to over time in the event that we were ultimately successful at some point in the future. The Lehman parties will also take risk of ownership of these assets going forward, and in that way they will also bear the risk of changing market values for the loans or participations. If there is any sort of exchange rate volatility they will also take on that risk. And I intend to take this money and make a distribution to creditors hopefully in the spring.

Moreover, Bankhaus as part of the settlement, receives substantial allowed claims against the Lehman parties' estate. I have discussed these matters and the settlement agreement with the creditors assembly. It has vetted and approved this agreement. I've also met on a number of occasions with the creditors' committee, in at least seven meetings, and have also vetted the settlement agreement. Both have approved this settlement agreement and both have authorized Dr. Frege, myself, to execute and sign the agreement.

In light of the settlement -- I'm sorry, the settlement letter that was just supplemented, I intend to meet

with the creditors' committee next week to advise them of these proceedings and the conclusion, and then move to closing as provided for in the agreement. And under German law there's no requirement for a court authority in Germany to enter into this agreement.

So, in conclusion, entering into the settlement agreement, in my view, reflects a demonstration of sound business judgment as an insolvency administrator under the circumstances. I believe that discretion is sound and it's within my authority as an insolvency administrator for Bankhaus.

It is also in my view, the settlement agreement is fair and equitable and in the best interest of creditors of the Bankhaus bankruptcy estate.

That would be Dr. Frege's testimony if called.

THE COURT: Is there any party who objects to my receipt of the offer of Dr. Frege's testimony by means of his counsel's proffer? There's no objection and I accept the proffer.

MR. YATES: Thank you, Your Honor. With that, we would also then move for approval of the settlement agreement in the Chapter 15 proceedings. And for the Court's information, the way that we have structured the order is that we make relevant findings with respect to the Chapter 15 process, filing service, et cetera. But then essentially we

incorporate by attaching the order that would be entered with respect to the LBHI proceedings. And in that way we retain consistency between both documents. So our order is going to be, you know, considerably less voluminous, but, essentially, it will incorporate it by reference as if attached.

THE COURT: It's your Chapter 15 case. And if that's what you want, that's fine.

MR. YATES: All right. Thank you, Your Honor.

THE COURT: I'm prepared to enter the order in the form that it has just been described in the Chapter 15 case. This now becomes I think the longest uncontested matter in the history of the Lehman bankruptcy. And appears to represent one of those unusual win-win circumstances in which parties on both sides of the litigation risk recognize that there are mutual advantages to an early settlement and a businesslike settlement as opposed to a litigated outcome. I think for that reason it's worth the time, and I also think it's a good example for others to emulate.

I assumed by virtue of the proffer just made of Dr. Frege's testimony that the ability to monetize assets and to do so promptly represented a significant reason that supported the business judgment of Dr. Frege because the insolvency regime in Germany is focused on liquidation in a commercially reasonable manner.

To the extent that it is helpful to his process for me

to confirm that I believe that what has been represented constitutes a commercially reasonable liquidation, I so order the record.

Now, is there anything more for this?

MR. YATES: Your Honor, I have a proposed order.

THE COURT: You can -- why don't you just give that to Mr. Krasnow to --

MR. YATES: Sure.

THE COURT: -- hand up when he hands up everything else at the end of today's --

MR. YATES: Thank you, Your Honor.

THE COURT: Fine. And if you wish to be excused, you may be excused.

MR. YATES: Thank you.

THE COURT: And if you wish to stay you're perfectly welcome to stay.

MR. KRASNOW: Your Honor, before we get to the next item, in that regard, just to advise the Court Mr. Ehrman does need to leave. Among other reasons, we are holding the third global protocol meeting this time in New York, and his attendance is required and mine will be. But if those who need to attend that meeting may be excused and we can then proceed to what is the contested section of the calendar.

THE COURT: That's fine. I'm just going to make the suggestion that at the next omnibus hearing in February that

there be a brief status report as to the progress, if any, made at this most recent meeting of the parties pursuant to the protocol.

MR. KRASNOW: I'm sorry, Your Honor. We would intend to do so.

THE COURT: Great.

MR. KRASNOW: Your Honor, the next matter on the calendar which is the contested portion may be shorter than the uncontested portion, is item number 6. It is the motion of Merrill Lynch International for relief from the automatic stay.

Your Honor, this is styled as a status conference. At the omnibus hearing Your Honor heard arguments with respect to that particular matter. And before we get to the substance of that I'd like to make an application to the Court.

There was much discussion, Your Honor, with respect -- at the last hearing about the request that Merrill had been making -- was making, the potential implications, if any, that it might have with respect to a whole series of similar notes that had been issued by the Lehman Dutch entity referred to as LBT. And Your Honor heard from counsel representing the Dutch trustees in that regard, who I believe is in the courtroom now.

THE COURT: Yes, he is.

MR. KRASNOW: While we certainly have firm views which were expressed at that last hearing with respect to this motion, subsequent to the matter being heard then we thought

that what might make the most sense, is rather than dealing with this acceleration, automatic stay issue, in the context of the Merrill Lynch motion, that we be afforded an opportunity, particularly given that we have the global protocol meetings this week, and plan on having separate meetings on this issue among others with the Dutch trustee and his respective Dutch and U.S. counsel if this matter were adjourned to February, to see whether or not as a result of those discussions there was a more global approach, if you will, that could be taken with respect to the acceleration, automatic stay issue. We made that request of Merrill, they're not prepared to adjourn this matter, and so I make this application to the Court, if you will, for the Court to consider an adjournment of this hearing to the February hearing to afford us an opportunity to have the kinds of discussions I've just described with the Dutch trustee. And depending upon what the outcome of that may be, obviously, then with Merrill, rather than proceeding to deal with the automatic stay issue, albeit, it's limited to Merrill, but could have broader implications. Again, rather than pursuing the merits of that today. So that is our request.

THE COURT: All right. Does Merrill oppose that request?

MR. KRASNOW: Yes, they do, Your Honor.

THE COURT: Okay. I guess I'll hear the reason why.

MR. ZIMMERMAN: Good morning, Your Honor. George

Zimmerman of Skadden Arps on behalf of Merrill Lynch International and certain of its affiliates.

We do oppose the motion for adjournment. And if I can just --

THE COURT: Let's just say that you were to prevail what would I do with this today? I expected the parties to have worked out, consistent with comments that I made from the bench, a stipulation which would be presumably entered as an agreed order. If not, you run the risk of losing, don't you?

MR. ZIMMERMAN: Yes. And that's just --

THE COURT: Is that what you want to have happen?

MR. ZIMMERMAN: No.

THE COURT: Okay. So why do you oppose this --

MR. ZIMMERMAN: Two reasons. We did pursuant to your instructions submit a proposed order that was very simple, because you had dictated what you thought the parameters should be last time.

THE COURT: It wasn't exactly dictated as much as musings from the bench.

MR. ZIMMERMAN: No, fair enough. Musings from the bench. That basically, forget the words for a second, would say that Merrill Lynch has the ability to serve its notice of acceleration on LBHI, with no deleterious impact whatsoever on LBHI, and reserving all parties' rights to do whatever -- to argue whatever they want if and when we have to come before

you. And it would be without prejudice to everybody's rights.

We submitted it -- now, we submitted the draft language to LBHI. We then asked for comments followed-up and they said they'd like an adjournment to discuss a global protocol with the LBD trustee. We have no problem, we know you are very respectful of global protocols, as are we. Merrill Lynch has no objection to them having whatever discussions they want. They've had two months to try to start that, they can take as much time as they want. Nothing about the proposed order, which I'll get to in a minute, would impact in any way their ability to have those discussions. However, an adjournment has two adverse effects on Merrill Lynch.

And you will recall, Your Honor, that a lot of the other noteholders of LBT have already, without coming to this Court, served their notices of acceleration. As a result of that in the LBT the trustee has issued some guidelines as to how they may or may not value the claims. I don't know that there -- I'm not constraining the trustee in any way. He's free to calculate any way he wants he can change. But based on his current guidelines and without prejudicing our rights, let me just put it this way. There is a risk that because Merrill Lynch has not -- has come to Your Honor in respect to you prerogatives of this Court before serving a notice of acceleration, the claim of Merrill Lynch continues to diminish because it hasn't accelerated in LBT. It's continuing to be

discounted. All the other noteholders that have served their notices without coming to Your Honor don't have that problem. They've cut off the discount, arguably. Therefore, by coming to you and now adjourning it, not only is Merrill Lynch being damaged vis-a-vis the other creditors, but we are -- in effect, we are being subordinated to those noteholders who rightly or wrongly did not come to you to do that. So the problem is entering into the order, the agreed order, that we would propose to Your Honor has no bearing whatsoever, has no interference with LBHI's ability to discuss it -- global protocol with the trustee. We're all for that. Because if it works we can be part of it, we're fine. That's not a problem. If we have an objection we can come to you at the appropriate time. So there's no adverse impact in their ability to do that, but Merrill Lynch gets affirmatively hurt or could be -- I want to reserve my rights, could be affirmatively be hurt by their claim being diminished by having adjournment.

And if I may talk about just briefly, because it is really brief, when we submitted out proposed order after the adjournment issue was discussed, LBH marked up our order and had their own version. All in -- we incorporated virtually all their changes. The one I think substantive issue is this.

The language we are proposing and we got the transcripts and we understand your musings, Judge, but we tried to now track your language. And what you said was and what we

put in was, that when Merrill Lynch serves its notice of acceleration across the board, to the extent that in any way at the end of the day augments its claim, then that will have no deleterious impact whatsoever, on these Chapter 11 proceedings, subject to further order by Your Honor. It explicitly reserves everybody's rights to argue whatever they want about how the claim should be calculated here. And it explicitly reserves LBH's right -- LBHI's right to argue that somehow if they want to challenge the validity enforceability of the guarantee, they can do that, too. So it is without prejudice to anything. By definition it can impact their ability to get the global protocol they want. It preserves our rights and Merrill Lynch's claim from being diminished. And we think it's exactly what mirrors what you had -- your musings last time. We're happy to show it to you and you can mark it up any way you want. But we don't think it's appropriate to put this off again two months after we moved to begin a dialogue about a global protocol that they're free to make whether you enter this order or not.

THE COURT: I'd like to hear from Mr. Mayer in a couple of respects. First, I'd like to understand the nature of the prejudice in the Netherlands proceeding that has just been alluded to and whether or not it's possible to stipulate around that problem by agreeing that an acceleration that takes place pursuant to court order would be as of, say, today's

date, which would be the functional equivalent of giving both sides a little bit of what they want without my having to rule. That's my first question.

My second question is whether or not you can comment about the potential loss of position expressed by Merrill Lynch's counsel associated with delay in acceleration? Is that an appreciable issue as you understand Netherland's proceeding.

MR. MAYER: Thank you, Your Honor. Can I address them both together? They're kind of --

THE COURT: Absolutely.

MR. MAYER: -- very merged. For the record, Thomas Moers Mayer of Kramer Levin Naftalis & Frankel for the LBT trustees, I'll give the reporter the exact spelling at the end of the hearing, if that's okay. It's like their names are lengthy.

Your Honor, Dutch bankruptcy law is well over 100 years old. And part of our problem with dealing with claims is that we write on an extremely inadequate slate. And I say this as someone whose knowledge of Dutch law has increased meeting by meeting with sessions with my client.

But there is a concept of discounting back to present value depending on when an acceleration occurs. And I think that what Merrill Lynch is concerned about is that to the extent the date of acceleration is pushed off their claim will be further discounted by the passage of time. So I understand

Merrill Lynch's argument. I can't tell you that I support it or not for the following reason:

My client has not decided whether or not the filing of an acceleration notice, in and of itself, irrespective of the automatic stay stops discounting or not. As I said at our last hearing we're not eager to run to conclude to draw the explicit conclusion that the automatic stay has no force and effect and we will take acceleration notices without regard to what this Court does, but we might get there. And if we get there then there is no prejudice to Merrill Lynch, their notice is the same as everybody else's notice, whether or not relief from the stay is granted.

If we decide that everyone needs to get relief from the automatic stay in order for us to recognize the notice yes, then, Merrill Lynch is first past the post and they're getting a benefit over all of the 394 other notices that were filed as of yesterday, according to my client.

We're not in this to give Merrill Lynch a leg up on anybody else, we're in this for administrative deficiency.

If I have to rank my preferable outcomes and we filed papers basically in an observer's status, I'm not here objecting to Merrill Lynch's motion, I'm -- we supported particular relief being a finding that the automatic stay did not affect calculations in the Netherlands because we had our very own -- our own parochial, if I may, interest at heart.

First, we wanted to treat everybody equally in the Netherlands. And, second, Your Honor, the process of determining claims under these notices is very difficult. To give you just one example, a couple of months ago we gave a trial run on one issue of these notes to the folks at LBHI and it took them a week. There are 4,000 notes.

Now, hopefully, whoever does this gets better with it over time, because 4,000 times one week and we're here a long time. But the point is the work of determining how to calculate these notes is ongoing and it will pick up steam. And there is a benefit to certainty. My client is meeting with the debtors on Friday. This is an issue we hope to address. In our view, what is most important is that there is a uniform determination that we can reach, that both accords appropriate deference to this Court and treats everybody the same. So I'm not unsympathetic to the debtors' request for an adjournment so that we can work all this out, but I am also not unsympathetic to the notion that this thing shouldn't linger. Because if we're continuing to make determinations on claims and then the legal framework isn't solid, we may have to do them again, and that's a bad idea.

So I guess, bottom-line, I can't tell you Merrill Lynch is going to be prejudiced because I don't know which way we're going to come out, on whether their notice is effective without relief, or not effective without relief. And I can't

say that there is a meeting set up to discuss a global protocol solution to this on Friday with the company. If the Court provides an adjournment we'd more than understand it, but we would hope that this process doesn't linger and at some point -- and maybe we need to file a separate set of papers to specifically ask for this relief in our own hook, that the Court does enter an order providing that nothing -- that no notice of acceleration shall have any affect on the administration of the U.S. estate, but that the automatic stay does not provide that notice of acceleration of whatever effect it may be given in the administration of the Dutch estate.

THE COURT: I don't want to get into the practice of once again drafting orders from the bench off the cuff. And everybody is stating their own positions, and that isn't necessarily what will be in the order to be entered.

I took a look at my calendar and I note that I have some Lehman time set aside at 2 o'clock on the 21st. I believe that is in connection with certain adversary proceedings. My inclination having heard the various arguments is to give the protocol process a chance to globalize, to use Mr. Krasnow's term, this issues as it relates to the Merrill Lynch notice of acceleration. And in particular to allow the parties to speak principal to principal with the advice of lawyers to try to develop a broader application to this potential blunt instrument that we're creating. And, so, I will adjourn this

to the 21st at -- I have a 2 o'clock note on my calendar. I don't know what the precise time will be. And rather than have the lawyers who are involved in what I hope will be a very concise presentation of we have an agreement sit around waiting, perhaps we'll calendar that for later in the afternoon at a time to be determined once I have a better understanding of what the agenda looks like for January 21.

I'm sensitive to the arguments made by Merrill Lynch's counsel that there is some potential prejudiced associated with delay, but I can see no appreciable prejudice associated with the delay of about one week. And I also recognize from Mr. Mayer's remarks that prejudice is entirely hypothetical at this moment, and may not exist at all based upon the procedures to be adopted by the trustee in the Netherland's proceeding. So, with that, we'll adjourn it at least until the 21st without their being any assurance that I will enter any order on that day. It will once again be a status report with the hope for result being that the very diligent and intelligent lawyers who are involved on all sides will not choose to make this a contested proceeding. Because as was noted in the earlier uncontested matter, there is litigation risk to be avoided.

MR. MAYER: Thank you, Your Honor. May I be excused?

THE COURT: You may.

MR. MAYER: And may I approach the reporter with the correct spelling of my client's name?

THE COURT: You may.

MR. KRASNOW: Thank you, Your Honor. And if I may be excused to attend the global protocol meeting?

THE COURT: You certainly may.

MR. KRASNOW: Thank you, Your Honor.

THE COURT: And anyone else who needs to be excused or who wants to leave may also leave.

And for those who are listening in on the telephone please make sure that your phones are muted.

MR. WAISMAN: Your Honor, Shai Waisman for Lehman Brothers.

We are now at matter number 7 on the amended agenda filed last night. This is LBHI's motion for authorization to sell certain asset backed securities and related relief.

By this motion, Your Honor, the debtors seek three forms of relief. Establishment of procedures to sell asset backed securities with an approximate value of about 180 million dollars authorizing the debtors to, in essence, authorize Neuberger Berman, who manages these securities, to exercise rights that come along with the ownership of those securities and authorizing the debtors to hedge against certain risks in the ownership of the securities in certain amounts specified in the order.

Your Honor, the motion was filed on December 23rd and served, objection deadline was January 6th. One objection was

filed, that was the objection of U.S. Bank. Your Honor, the debtors have spoken at length to U.S. Bank have provided U.S. Bank with a list of securities. U.S. Bank has indicated that based upon its review it does not believe it has any interest in the securities and has asked that the debtors also represent on the record, which I am now doing, that we do not believe that U.S. Bank has any interest in these securities. And with that representation, that objection has been withdrawn.

I'm happy to answer any questions Your Honor may have. Otherwise, we ask that the order be entered authorizing the relief requested.

THE COURT: Does anyone wish to be heard with respect to this matter? Apparently, somebody does.

MR. PRICE: Craig Price from Chapman & Cutler on behalf of U.S. Bank.

And I'm just confirming what the debtor said is indeed correct. We have reviewed the list of securities to be sold, and U.S. Bank does not believe -- it does not appear that any of them are related to U.S. Bank. So we're withdrawing our reservation on that.

THE COURT: Everybody seems to stipulate that you have no interest here.

MR. PRICE: That's right.

MR. O'DONNELL: Your Honor, Dennis O'Donnell, Milbank Tweed Hadley McCloy, on behalf of the committee.

I'm just confirming that we have reviewed this motion. And, in fact, our derivative subcommittee signed off on it. Provides for a role for the committee that's comparable to the role it has with respect to other asset classes and we're comfortable with the procedures as proposed.

THE COURT: Fine. This is now an uncontested matter and it's approved.

MR. WAISMAN: Thank you, Your Honor. The next matter on the calendar is a motion of Seattle Pacific University. And I would ask their counsel to come forward on the matter.

THE COURT: Okay.

MR. MICHAELSON: Good morning, Your Honor. Robert Michaelson of K&L Gates on behalf of Seattle Pacific University.

This is a motion to compel the debtor to assume or reject an interest-rate swap agreement. By way of background my client is a not-for-profit educational institution located in Seattle. It is not well endowed. This agreement was entered into in order to hedge its liability under a twenty million dollar bond use for the construction of facilities at the college. In other words, this agreement is an insurance policy against unforeseen or excessive increases in the interest rate because it's a floating rate.

Now, there is a representation been made to the Court by debtors' counsel that we had an opportunity to reject this

agreement pursuant to 560, to walk away from it pursuant to the Safe Harbor provisions. We did not. And the reason we did not was because we were under the impression based on conversations with debtors' counsel that this agreement would be assumed and assigned, or at least a strong effort would be made, and that there would be a possibility -- I don't want to characterize the likelihood of the possibility. We relied on that and we reserved our rights accordingly.

It became obvious to us over time that this wasn't going to happen. And we became increasingly concerned about what would ultimately become of our position should this be rejected. At this point we are paying, as we're required to under the agreement, but we're really paying for an insurance policy that won't be there should we ever need it. We need to cover ourselves and we understand that in order to do that we need to extricate ourselves from this agreement.

We don't believe that this agreement is one that is readily assignable for one reason that's a bit peculiar to this agreement.

THE COURT: I read that in your papers and I understand the issue of one-way posting of collateral in this particular transaction. I gather that Lehman is required to post collateral but your client is not. And as a result from the perspective assignee, you at least allege that that makes this a difficult agreement to assign, correct?

MR. MICHAELSON: That is correct, Your Honor.

THE COURT: Okay. I understand that's your argument but it's just an argument. And I don't know anything yet about the actual marketing efforts with respect to this swap agreement, nor do I have any expert reports or testimony to confirm the allegation. So I want you to know that at least from an evidentiary perspective, I accept what you're saying, but I have no way of knowing if it's correct. And it's not going to be determined today.

MR. MICHAELSON: I understand that, Your Honor. However, even aside from that issue we do know one thing. We know that it has not been assigned as of this date. I don't think that the debtor is going to deny that efforts have been made and that those efforts have been unsuccessful. In the meantime, we continue to be paying what are essentially premiums on an insurance policy that will not be there should circumstances change, interest rates are obviously the governing force here, and we will be left naked.

I know there are other institutions that have these sorts of contracts. And I simply want to reiterate what I said at the beginning of my presentation, which is this is an institution that is not wealthy that depends very heavily on its ability to finance these construction bonds. And if the interest rate were to shift dramatically they would not have the reserves of an institution like a Harvard or Yale in which

to cover these. So they're left exposed and need to protect themselves. And all we're asking for at this point is for the debtor to make up its mind so that we can do what we need to do. If there is an assignee out there we'd be delighted. But if there is no assignee and there is no prospect for an assignee in the immediate future leave us to do what we need to do to protect ourselves. And that's really all that we're asking for, Your Honor.

THE COURT: Well, I think you're asking for more than that. You're seeking by virtue of the motion your prosecuting to compel the debtor, in effect, to reject this now and to allow you to go about your business and not have to pay them money. And this is an in the money swap. And I also understand that ADR has been demanded by Lehman in connection with this transaction. So this is not as simple as you portray it, at least in my view it's not.

I like your comments as to why I should decide anything in connection with a matter that has been, at least from Lehman's perspective, assigned to the ADR process.

MR. MICHAELSON: Your Honor, I'm glad you asked that question, because I'm not sure the ADR process is applicable in this situation. As we read paragraph 3(a) of the ADR process in order for there to be some sort of alternative dispute resolution there has to be a terminated -- a swap agreement does not apply if the swap agreement -- let me read this so

there's no confusion about it. Paragraph 3(a) of the ADR order indicates, "That the ADR procedures do not apply if the swap agreement has not been terminated." This swap agreement hasn't been terminated. So it's our view under what I think is clear language of the order, the ADR, that alternative dispute resolution, isn't applicable or available in this matter.

THE COURT: Why don't I hear from Lehman, at least -- not only in opposition to the motion on the merits, but also as it relates to the whole question of the applicability of alternative resolution procedures.

MR. LEMONS: Good morning, Your Honor. Robert Lemons from Weil Gotshal & Manges on behalf of the debtors.

I'll start with the ADR procedures applicability, because I think it's a -- certainly a simpler answer and that's where SPU's counsel left off.

Your Honor, SPU's counsel said he wanted to read you the words so that there wouldn't be any misunderstanding or miscommunication. I think that's interesting because he left out a critical word when he read you the words. The words are not "has not been terminated" the words are "has not been purportedly terminated." The word purportedly was inserted in that order for a purpose. The reason it was put in there is because as Your Honor is aware, the debtors have received numerous termination notices, some of which they contest and many of which -- some of which they do not contest, and many of

which they do contest. So this word was inserted in there and the procedures were established so that among other types of in the money contracts to the debtors the ADR procedures would also apply to those where a counterparty has purported to terminate what the debtor may dispute the effectiveness of that termination. So, Your Honor, we believe after SPU has purported to terminate this contract, that it clearly falls within the scope of the ADR procedures and is eligible for those. And we believe that the notice that we have served on SPU to trigger those procedures is certainly effective.

THE COURT: Okay. I've read your papers, I'm familiar with this. I'm also familiar with the disputed reply that was filed yesterday by Seattle Pacific University. And I'm not sure if I was supposed to read it, but I actually read the exhibit which is the demand for ADR, which was Exhibit A to that reply. Was I supposed to have seen that or not, I have no idea?

MR. LEMONS: Your were not, Your Honor. I'm not sure that makes it a significant difference, but under the terms of the ADR that was not something you were supposed to see. I believe that was inadvertent on SPU's behalf. And when we informed their counsel they took steps promptly to withdraw it. But it sounds like it may have made it into your chambers before the withdrawal was complete.

THE COURT: I read it with great interest. It doesn't

influence my decision on this motion, however. The content of the ADR demand, the position asserted by Lehman and any defense to that position taken by Seattle Pacific University are all irrelevant to the disposition of the pending motion.

What is relevant it seems to me is that there is a procedure that the debtors have sought to employ to try to read some kind of accommodation, mutually acceptable, I assume, because that's what ADR is about, with Seattle Pacific University as to this in the money swap transaction. It makes sense it seems to me for that procedure to run its course before I deal with the merits of this motion. And, frankly, from Seattle Pacific's perspective it's a plus. Because if there were no ADR procedure available to perhaps lead to a mutually acceptable resolution of the issues in dispute, I would deny the motion. So the good news is there's a procedure that you can all look to to maybe get to the business accommodation you need to reach. The bad news is if you didn't have that this motion would be denied without prejudice. And I say that because at this moment while there is hypothetical risk to an undoubtedly sympathetic counterparty at some future date if there is a move in interest rates that's not a risk today that I can value. And to the extent that we have an in the money contract I'm not going to accelerate the time for the debtor to assume or reject simply because I have a sympathetic counterparty. The contract is what it is. Says what it says.

And the debtor has the time available under the Bankruptcy Code to make its decision to assume or reject.

I say that in no way to limit the discretion that I have under 365 in appropriate cases to accelerate the time, and it may be that at some time in the future I might conclude that Seattle Pacific has shown cause. Such cause has not been shown as of today.

MR. LEMONS: Thank you, Your Honor.

MR. WAISMAN: Your Honor, my colleague Peter Gruenberger will present the next motion.

THE COURT: All right.

MR. GRUENBERGER: Thank you, Your Honor. Good morning, Your Honor. Peter Gruenberger, Weil Gotshal & Manges, counsel for LBSF and affiliated debtors.

I am here today pinch-hitting for my partner, Richard Slack. Unfortunately, he's in another city, in another court today on an emergency and he apologizes for not being here.

Your Honor, I can't promise that --

THE COURT: He should be apologizing to you.

MR. GRUENBERGER: He has already in spades. I can't promise that my remarks are going to be as interesting as those proffers we heard earlier today, but I'm going to try to raise the excitement level from that a little bit.

As Your Honor is aware, on October 28, 2009 LBSF filed a motion to compel Capital Automotive to perform its obligation

pursuant to the 2006 master agreement between the parties, which agreement the parties' papers have labeled the swap agreement. On November 30, 2009, Capital Automotive filed an objection to that motion to compel with two supporting declarations. Those opposition papers, Your Honor, were replete with references to negotiations and communications between the parties relating to potential settlement of disputes between as to the swap agreement at issue. LBSF believed all such references were barred explicitly by the very specific terms contained in a negotiation agreement that Capital Automotive itself drafted.

For that reason after a chambers conference in December we moved to strike Capital Automotives objection to the motion to compel. It is that motion to strike that is before Your Honor today. The merits of the motion to compel are not before the Court today.

We served our motion to strike on December 23, 2009, Capital Automotive filed timely it's objection thereto on January 5, 2010. We filed our reply yesterday morning.

I ask permission, Your Honor, to hand up a hearing binder which will aid the Court in following word-by-word the numerous ways in which Capital Automotive has ignored the negotiation agreement, violated its terms and in so doing simultaneously has attempted to rewrite the swap agreement at issue. May I approach, Your Honor?

THE COURT: You may approach with the hearing binder. Okay. Just so long as this isn't flown around the courtroom as a weapon.

Before we get into the substance of the hearing binder, I want everybody involved in this particular dispute to understand what my current perspective is on it so that you can mold your comments to some of my concerns.

One of my concerns is that this seems to be a proliferation of litigation in a case which already has a fair degree of active motion practice in it. And when we had our chambers conference that was really a telephone conference I was not encouraging in respect of the filing of this motion to strike, and made the comment that to the extent that there was a violation of the negotiation agreement or a violation of Rule 408 of the Federal Rules of Evidence that it was an evidentiary question and we're not having an evidentiary hearing today. Mr. Gruenberger, you said so yourself, this is just a hearing on the motion to strike --

MR. GRUENBERGER: Right.

THE COURT: -- not on the merits. Additionally, motion practice in the Lehman case generally and in basically every single case I have on my docket is not at least at the first call of the motion, an evidentiary hearing, if an evidentiary hearing is required it's later scheduled. So I have a threshold question which is is it even appropriate for

me to be considering on a motion to strike basis material that I have already read? I mean, this is in some respects very much like the last case with Seattle Pacific, where I wasn't supposed to have read the ADR demand, but I did read it. Well, I read the declarations which set forth from Capital Automotive's perspective, the back and forth of negotiations, some of which were detailed and some of which were general, and most of what I supposed you are concerned about reflect a perception, to use your reply papers terms, that Capital Automotive was "bamboozled" by your client. Not by you, personally, but that this whole process as it relates to the negotiation that I wasn't supposed to learn about, was unfair from the perspective of Capital Automotive.

Let's just say for the sake of discussion that none of that detail was presented to me and that all that Capital Automotive was saying in their motion papers was the following: "Judge, we have a negotiation agreement, we're going to honor it. But let me tell you something, if it weren't for that agreement we'd be able to tell you a parade of horribles of the activities of Lehman Brothers' employees who misled us. and if it weren't for those misleading statements we would have terminated this swap agreement in December of 2008." I'm being purely hypothetical in what I just said.

But if they had filed papers that said that how is that different in terms of the motion practice that's before me

in February from my seeing more detail as to what they have to say? That's question one.

Question two, what's the proper remedy for a violation of the negotiation agreement? Is it a motion to strike? Is it an adversary proceeding seeking equitable relief in the form of an injunction that would prohibit certain activity? Is it an action for damages? Is it simply a defensive posture that you make in the context of the motion, itself? Is it a motion in limine before an evidentiary hearing that might take place at some point in the future? In other words, is the motion to strike even appropriate? And finally, I recognize that there may be some policy issues here that go beyond the matter at issue with Capital Automotive. And here's what I think it is.

I think that most of the activity in the Lehman bankruptcy case takes place outside the courtroom. I think that a lot of the activity that takes place in the courtroom is staged. This is, like, the Lehman Theater. We have an audience. We have proffers. We have very well prepared lawyers. And the material which is presented to me is distilled. It's distilled because good lawyers are involved on all sides. It's distilled because really confidential information shouldn't be on the public record sometimes. It's distilled because we have the press in the room and we have an open courtroom, as we should, where the public is available to hear what is supposed to be a transparent proceeding.

Nonetheless, I recognize that a lot of what is important in complex business negotiations is intended to be private. Are you pressing this motion because you believe the negotiation agreements, such as this one, from a policy perspective need to be enforced or are you pressing this motion simply as a preemptive evidentiary objection? If it is the former, I'm interested in hearing argument as to the policy issue. And that's my reason for the preamble to that last question. And my suggestion is that while I'm happy to see anything that you want me to see in any order you want me to see it in the hearing binder that I've already expressed to you what I'm most interested in in today's argument.

MR. GRUENBERGER: Your Honor, I'll try to take up each one of those. It's like running the 440 hurdles. I set up some hurdles, I've got to clear them, I shall.

THE COURT: Okay.

MR. GRUENBERGER: Take the last question first. It's the former, certainly, not the latter. Is it appropriate today? Yes. If the motion to compel had been responded to on the merits without violating an agreement, then that motion to compel would have been proceeded with in the manner that we representing debtors always proceed with things; directly and not for show, not for theater. Your Honor, we seek the last harmful remedies. I think Mr. Lemons in responding to the prior motion by Seattle Pacific University, they could have

moved for sanctions for that violation of the ABR order and Your Honor is very aware of who drafted that order. I did. They could have moved for sanctions. We could have. We didn't. We asked them to remove it from the record without theater. We're not making theater here.

Your Honor's hurdles, however, omitted one thing. And I think this was inadvertent on Your Honor's part. We're talking about the sanctity of contracts. Your Honor left that out.

There's a message that's going to be taken away from this hearing not by this counterparty but by a lot of counterparties. And let's focus today just on post-petition contracts like this negotiation agreement. When I finish today, Your Honor, I hope I will have persuaded you that the facts upon which we rely will show that this counterparty has ignored every word in a contract it presented to us to sign. And rather than reward such conduct, I think that the objection should be stricken.

Now, you ask for what other remedies could exist? Well, we could have asked for cost in making this motion to strike. We didn't do that. We aren't trying to be vindictive. We're just trying to get people to abide by contracts especially ones they make with debtors' post-petition and especially ones they draft and ask us to sign.

THE COURT: Mr. Gruenberger, let me just ask you a

question about something I perhaps don't need to know and maybe shouldn't know.

Is the negotiation agreement which was entered into in connection with the discussions between Lehman and Capital Automotive, even though it was drafted by Capital Automotive's counsel, as I understand it, a form of agreement that Lehman regularly and routinely enters into before engaging in discussions of this sort? If the answer to that is yes, this becomes a classwide issue. If the answer to that is no, this is a one of a kind or a relatively rare example of a party being extra careful that leads me to a different place. Which is it?

MR. GRUENBERGER: To my knowledge, Your Honor, this is unique. This is not part of Lehman's regular course of business and negotiations. I'm not aware of any.

THE COURT: Okay. So this is not a situation where we're seeking to protect the sanctity of allegedly private and confidential negotiations relating to settlement pursuant to a form of agreement that Lehman regularly uses. This is rather a one-off situation.

MR. GRUENBERGER: No, Your Honor. I don't agree with that however, and let me draw the distinction. A contract is a contract. You just said that yourself. I don't want to quote you back from another matter but the last matter you just said, "A contract is a contract and it goes where it goes". I don't

think we have different rules for negotiation agreements, agreements to buy and sell, agreements to assume or reject. I think we have agreements that should be honored or should not be honored. And the message that I would like to send away after this motion is decided is that contracts ought to be honored not dishonored.

THE COURT: I won't disagree with you that contracts are intended to be performed, but that's not really the point. The point is whether or not a motion to strike certain statements that were made in papers filed by Capital Automotive should be stricken on account of alleged violations of the contract. We're not dealing with a contract in an abstract way. We're dealing with the application of a particular contract to particular allegedly inappropriate conduct.

MR. GRUENBERGER: Correct, Your Honor. And when we get to the statement of the law, I will cite you law that says that this is the appropriate remedy when this type of agreement is violated.

THE COURT: Okay. Why don't you go ahead? It's now high noon.

MR. GRUENBERGER: Thank you. And now, the hearing binder -- the hearing binder, Your Honor, does not contain any cases. It does not contain argument of law. It doesn't contain legal argument from me or anybody else. There's no clever spin on the facts whatsoever. All it is in the binder

is in three distinct parts we have documents of record and only documents of record in this case. Each part rebuts beyond per adventure, I believe, each one of the three themes that Capital Automotive has woven seeking to justify its use of settlement negotiations and communications.

Theme 1 is that the negotiation agreement is merely a restatement of Federal Rule of Evidence 408. A rule that generally precludes evidentiary use of settlement talks to prove liability but permits use of settlement talks for other purposes. A standard Courts have always used in applying Rule 408.

Tabs 1 through 7 of the binder, Your Honor, set forth the specific terms of the negotiation agreement revealing clearly that that agreement is the exact antithesis of Rule 408. And unlike Rule 408 stands as an explicit bar to the very uses to which Capital Automotive has put the settlement negotiations and communications and has done so in an attempt to negate LBSF's contention that Capital Automotive unduly delayed exercising its rights under the swap agreement. Now, those words become very important. And I'm going to come back to them again.

Theme 2, they read, is that the negotiation agreement does permit use of negotiations and communications in connection with attempts to enforce rights and remedies under the swap agreement and that such enforcement is all that

Capital Automotive innocently was trying to accomplish by way of its references to the negotiations.

Well, Tabs 8 to 10 of the hearing binder, Your Honor, set forth specific sections of the swap agreement that demonstrate that the alleged rights and remedies that Capital Automotive was trying to enforce never existed at all and thus are not capable of being enforced in this or any other matter suggested by Capital Automotive. Rather, as we demonstrate, Capital Automotive has tried to use the negotiations and the communications to rewrite the swap agreement's terms.

Theme 3, that Capital Automotive puts forth is that it has no idea about which communications and negotiations we're complaining about. No idea at all. However, Your Honor, on the Tabs 11 through 23, we set forth thirteen specific paragraphs, word by word, that add two declarants in support of their motion to object -- their objection to our motion to compel filed and those declarations led to this motion to strike. Those declarants very words pull away the simple sun mask that Capital Automotive would wear in this courtroom today.

Let me begin with the cavalier approach that this negotiation agreement is Rule 408 in another cloth. That poses rarely undermined by just a cursory comparison of the words of Rule 408 with the words of the negotiation agreement. We have set forth the entire Rule 408 at pages 8 and 9 and paragraph 18

of our reply brief.

Rule 408 on its face provides only for certain limited protections against disclosure as follows: A) Prohibitive uses. Evidence in the following is not admissible on behalf of any party when offered to prove liability for invalidity of or amount of a claim that was disputed as to validity or amount or to impeach through a prior inconsistent statement or contradiction. And there are two different things that are prohibited. You can't talk about furnishing or offering or promising to furnish or accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim. And 2) Conduct or statements made in compromised negotiations regarding the claim.

And 408(b) talks about permitted uses. That says, "This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision A. This is still", I'm quoting, "within the rule examples of permissible purposes include among other things" and I'm emphasizing this, "include among other things negating a contention of undue delay."

Now, Your Honor will notice that Capital Automotive nowhere in its objection anywhere cites all of Rule 408 or quotes its terms. Rather, through a clever use of ellipses, Capital Automotive's objection at page 12, footnote 6, omits that key language from 408(b). They omit examples of

permissible purposes include "negating attention, a contention of undue validity", unquote. They just leave it out. There's a reason they leave it out. Because that's exactly what they put into the negotiation agreement could not be done. They put into the negotiation agreement that no negotiations or communications can be used to try to prove or negate a contention of undue delay. I'm going to take you through the agreement and show you exactly where that is.

Under Tab 1 of the binder, Your Honor, we have the whole negotiation agreement. Under the succeeding tabs we have pullouts. So that Tab 2 shows, or paragraph 2, what this is definition of negotiations defined as covering all discussions and negotiations concerning the parties obligations to each other under or relating to the swap agreement including its termination.

The definition of communication as it's contained under Tab 3. Paragraph 3 defines communications as all correspondence, discussions, negotiations, meetings, graphs and telephone communications among the parties or their respective attorney, agents and representatives with respect to the swap agreement or with respect to defined -- the defined term negotiations.

The main guts of the negotiation first appear in paragraph 2 contained under tab 4 where it says, quote, "It is understood that the negotiations and any communications shall

be made with a view toward compromise and settlement and all such negotiations shall be protected accordingly and shall not be admissible as evidence on any issue that is or may be before any court or administrative body including without limitation as proof or admission of liability for -- or for other evidentiary purposes." Let's allow that one to sink in for a moment.

No use as proof or admission of liability or for other evidentiary purposes. These words alone directly contradict Capital Automotive's twisted argument that it may use negotiations and communications to negate LBF's (sic) contention that Capital Automotive was guilty of undue delay. But that isn't all that's in the agreement. It goes on much further and much more directly.

Under tab 5, Your Honor, we find the specific terms of paragraph 4 of the negotiation agreement in which Capital Automotive expressly agreed that negotiations and communications were contemplated for purposes of compromise and settlement and that no such negotiations or communications shall ever be admissible for any other purposes such as a purpose to prove intent or to negate a contention of undue delay or any other purpose. So much for their argument that this is exactly like Rule 408. It's the exact antithesis of Rule 408. Thus, we have no quarrel with the Second Circuit cases that Capital Automotive cites at pages 12 to 15 of their

objection because under those cases we win.

Those cases include the 1989 case of Trebor, T-R-E-B-O-R Sportswear v. Limited Stores, 856 (sic) F.2d 506 at page 511 and the 1999 case of Starter v. Converse, 170 F.3d 286 at page 293. Both cases state the age-old standard; governing application of 408 in both (a) and (b). Evidence of a settlement agreement and surrounding circumstances though barred by 408(a) can fall outside the rule if offered for another purpose. But that age-old application of 408 does not and cannot fit here where the parties have agreed expressly that such other purposes are also barred from use including the ones about intent and the one about negating undue delay assertions.

And thus, Your Honor, I now turn to the case that says that we're doing exactly the right thing by moving to strike. The Connecticut District Court in the 2006 case, Victor G. Reuling, R-E-U-L-I-N-G Associate v. Fischer Price Toys, 407 F. Supp. 401 at page 404, the Court struck all references to negotiations because of an agreement signed by the parties that is here barred any use thereof for any purpose. We seek the same relief here because the facts here are even better for LBSF than they were for the movant in that case.

It's ironic, Your Honor, that the party who drafted this agreement contended all these encompassing restrictions which stand here today contending it has the right to try to

use the negotiations and communications that it said should not be used to create the impression that we agreed to a termination of a swap agreement in December 2008. And that Capital Automotive uses these negotiations and communications merely to try to enforce its alleged rights and remedies under the swap agreement.

But happily for us and unhappily for Capital Automotive, the negotiation agreement and swap agreement itself, I think, bar and I think Your Honor will conclude, bar such a tortured assertion.

Under tab 6 of the binder in paragraph 3 of the negotiation agreement, Capital Automotive agreed that, quote, "No amendment, modification, compromise, settlement, agreement or understanding with respect to the swap agreement and no rights, claims, obligations or liabilities of any kind either express or implied shall arise or exist in favor of any party or be binding upon any party or other person as a result of the negotiations or communications except to the extent set out in a written agreement executed by all parties to be bound." There is no such writing in this matter, signed or otherwise. That is not all.

In the fifth and last paragraph of the negotiation agreement, under tab 6 also, the parties acknowledged that they had executed that agreement, quote, "With the goal of engaging in negotiations or communications in an open, frank and direct

manner without risk of exposure to liability as a result thereof and an order to avoid any claim or allegation that the swap agreement or any obligation arising thereunder has been modified, amended, waived or altered in any matter -- in any manner whatsoever by the negotiations or any communications." Yet, that is exactly what Capital Automotive stands here today trying to do.

And finally, with respect to the bamboozle point Your Honor alluded to earlier, the negotiation agreement in paragraph 2 under tab 7 gives the absolute deaf note to that last melody Capital Automotive plays in its Theme 2. It's criticism to LBSF for allegedly stringing Capital Automotive along by pretending to continue with negotiations but not even settling this dispute or giving notice that it was terminating negotiations. That's their allegation. Unhappily for Capital Automotive on this brand of its theme, paragraph 2 of the negotiations where it clearly provides and expresses that no party shall have any obligation to commence any negotiation or once -- and if commenced to continue with such negotiations and any party and such parties sole and absolute discretion may terminate the negotiations at any time and for any or no reason with or without cause or notice.

Your Honor, I now turn to the matter in which Capital Automotive has tried to use these negotiations for settlement to change the swap agreement itself.

As Your Honor is well aware, Section 6(a) of the master swap agreement set forth, and it's under tab 8 in the binder, that " A noninformed party may give notice to the defaulting party specifying a relevant event of default", here LBHI's Chapter 11 filing of September 15, 2008, "and the rights of designated day not earlier than the effective date of the notice as the early termination date."

The record is clear here that Capital Automotive never sent any termination notice to LBSF prior to November 30, 2009 some fourteen months after the Chapter 11 filing and more than a month after LBSF had filed its motion to compel performance. Nor can there be any dispute that this fourteen month late termination notice in it Capital Automotive tries retroactively to backdate the effectiveness of the termination back to December 1, 2008.

At the same time, Capital Automotive, through what we believe are illicit uses of negotiations and communications occurring between January and August 2009 argues that somehow LBSF magically knew that the swap agreement had been terminated in December 2008. That's what they contend. But the swap agreement itself, Your Honor, in paragraph 9(b) and this is under tab 9, requires that any amendment, modification or waiver in respect of the swap agreement is not effective unless in a writing executed by each of the parties. This is the same writing requirement that the termination -- I'm sorry, the

negotiation agreement by Capital Automotive contains. We just looked at it

And just to make certain that there could be no misunderstanding about the swap agreement, it provides in Section 12, and that's under tab 10, that "Any notice of communication given in respect of the swap agreement may be given only by some form of writing." A writing. Not by smoke signals, not by smoke and mirrors and not by smoking anything else, Your Honor, and certainly not by a notice of termination that was never sent to or agreed to in writing by LBSF.

THE COURT: That's a nice reference to the 60s there.

MR. GRUENBERGER: Well, some of us were there.

Your Honor, now having established that the negotiation agreement forecloses use of negotiations or communications to effect modifications of the swap agreement, I turn to the Theme 3 assertions by Capital Automotive that they are still unaware of precisely how it violated the negotiation agreement pretending that our motion to strike was not clear enough when it cited the precise sections and pages of Capital Automotive's objection to motion to compel that contain the offending uses of negotiations and communications.

That reference should have been good enough, but just to make sure that the record is clear on this, Your Honor, tabs 11 through 13 of the hearing binder contain the exact words used by the two declarants who filed declarations supporting

Capital Automotive's objections.

Now, let's look at the declaration of Roger Statle (ph.), dated November 30, 2009 which contains an entire section entitled "Negotiations between the parties". I think that label has a familiar and telling ring to it. And under that section, under tab 11 in paragraph 19, Statle refers to a specific telephonic negotiation on December 17, 2008 with an LBSF representative describing the outlines of an alleged potential settlement.

Then, under tab 12, paragraph 20, Statle sets forth what he believes was the intent of both negotiating parties.

And under tab 13 in paragraph 21, Statle again uses negotiations and a specific e-mail in an attempt to evidence both parties alleged intent concerning the framework of settlement including discounts. Your Honor will recall that the negotiation agreement specifically bars use of negotiations as evidence of intent.

Then, under tab 14, in paragraph 22, Statle asserts that in January 2009, LBSF made a settlement offer as further proof of the party's alleged common understanding using specific dollar signs.

And under tab 15, Statle describes an alleged January 2009 counteroffer by Capital Automotive using specific dollar amounts.

And under tab 16 paragraph 24, he again asserts LBSF's

understanding of how close the parties allegedly were to settlement as of January 12th, 2009.

And in paragraph 26 under tab 17, Statle describes yet another counteroffer made on February 17 by Capital Automotive with more specific dollar amounts included. On and on and on to paragraph 27, 28 where Statle does it again and again but not resting with one declarant, they had another one, Mr. Dennis Rosenfeld, and so he does the same thing.

And under tabs 21, 22 and 23, he too talks about the intent of the parties, the settlement descriptions that the parties were engaged in all barred by the negotiation agreement.

Your Honor, I have nothing further and I don't think anything further is needed to send this counterparty and all counterparties in these cases of Lehman, these Chapter 11 cases, a clear message from the Court. That message ought to be that agreements really do mean something. They are not chess pieces to be moved around at the whim of a counterparty depending on any day how the winds may be blowing or how interest rates may be moving.

Debtors submit, Your Honor, respectfully that anything less than the striking of these objections and these offensive uses of negotiations and communications may transmit the wrong message. One that says parties can walk away from contracts, walk away from their commitments with no accountability. And

that's what we're talking about; accountability. We trust that the Court will rule on the side of accountability and send the appropriate message.

I hope I've answered your questions and I'm here to answer any more Your Honor may have

THE COURT: Not quite. You haven't quite answered them in this respect and this is still something that's bothering me.

Declarations were submitted in connection with the original papers filed by Capital Automotive and you've highlighted the sections of the declarations that the debtors view as offensive.

MR. GRUENBERGER: Correct.

THE COURT: But at the moment, these declarations have not been offered into evidence. There's no evidentiary hearing in connection with the substance of the motion. In fact, that's not to be heard --

MR. GRUENBERGER: Right.

THE COURT: -- as I understand until February 10th. And at least at this moment, what I conclude you're seeking is a preemptive evidentiary determination that if these declarations were to be offered, they should not be admitted because they are -- they have been crafted in violation of the negotiation agreement Apparently, you're seeking more than that.

You are seeking a determination that it's a violation of the agreement to have prepared and filed the declarations in the first place and that the negotiation agreement precludes any use whatsoever --

MR. GRUENBERGER: Or attempt to use, Your Honor. Those are the words it uses.

THE COURT: -- well, let's go to that language. Let me understand how the language of the negotiation agreement ties to the motion to strike at this stage of the proceeding.

MR. GRUENBERGER: Okay. Well, there are several ways to approach that, Your Honor. If Your Honor comes from the point of view that everybody is entitled to two bites of the apple, that is that you can just ignore an agreement and if you're caught then we have time to talk about it. That the agreement says you can't try to introduce it and by introduce Federal Rule of Evidence 408 does not mean in an evidentiary hearing, it's any use in any court for any purpose. That's what paragraph 2 says. Any use for any evidentiary purpose. Now, an evidentiary purpose, Your Honor, is not an evidentiary hearing, it is support for a position. They didn't cite the negotiations and communications and give declarant support, I swear that it's true, for a purpose other than to use it to sway your mind. That's an evidentiary purpose, Your Honor, whether it's an evidentiary hearing or not. There is not two, three bites. One, we can do it if we're caught well, may --

then we'll argue about whether we should have done it. They shouldn't do it in the first place. Otherwise, agreements don't mean anything. That's where I'm coming from. That's where the debtor is coming from. And, Your Honor, if what you just said was the rule with all respect, your words from the bench could be ignored and somebody could say, well, it's only words, I'll try. That isn't the way we want to do things. Not in this court, not in this case, not in this country. It's wrong. That's where I'm coming from, Your Honor, and that's where our estate is coming from.

THE COURT: Okay.

MR. GRUENBERGER: Thank you, Your Honor.

MR. REISS: Your Honor, Jeremy Reiss, Blank Rome, LLP on behalf of Capital Automotive. With me today also is my partner, Tom Biron, to my left. I'm going to try to proceed in order with the questions you posed at the beginning of my fine colleague's soliloquy there.

First, I think it's important to note that what we're dealing with here is not a confidentiality agreement. We're dealing here with an agreement which, if anything, limits the use of the introduction of evidence. It does not say that Capital and LBSF cannot tell others what were discussed during these negotiations. It does not say we couldn't take out an ad in the New York Times and say this is the position LBSF has taken in regards to the settlement of our rights under the swap

agreement. That's an important point, because one of the issues you raised is what is the -- if the negotiation agreement has been violated, what is the remedy. And certainly, I would say there is no remedy for -- there is no availability of damages, no availability of injunctive relief. We have done nothing that the agreement prohi -- we have not done anything the agreement prohibits.

First, also to be clear, we do not want to litigate this issue. Finally, yesterday after six weeks of trying to ferret out exactly what LBSF was concerned about, exactly what statements, it thought violated the negotiation agreement, they were finally identified in the reply that was filed sometime yesterday morning and now we have even further elucidation in this trial binder, this hearing binder, that was just provided, which gives us a little bit of more detail. And what is important to note is that their position has changed in the intervening six weeks.

At first, they said, let's strike the Statle declaration. Let's strike the Rosenfeld declaration. And now though identifies specific paragraphs. And our position has been and continues to be that we are happy it wants LBSF identified specific allegations that it thought were barred by the negotiation agreement in some capacity. We were happy to sit down with them and discuss whether those -- whether those allegations were, in fact, barred, what that meant, and how we

could fix that.

My colleague, Mr. Biron, sent Mr. Slack (ph.) a letter on December 4th and -- excuse me -- on December 7th in response to an e-mail Mr. Slack had transmitted on December 4th demanding we withdraw the objection and the declarations. Mr. Biron sent a letter saying, "Please identify exactly what you're talking about and we'll talk." We get it the day before the hearing and, in fact, it is much narrower than the relief they originally had demanded.

Now, the second question I believe he raised is whether this was right for adjudication at this juncture. And our position is is, no, it's not because as I noted in the negotiation agreement is not a confidentiality agreement. It does not bar us raising these allegations that are at issue. All it prohibits, if anything, is that certain allegations cannot be used as evidence.

Now, one of the things we have sought in our substantive response in the motion to compel is that this entire motion to compel that LBSF has brought is properly brought through an adversary proceeding. And if it were, in fact, re-filed as such, we would have -- we would have full latitude to make these very same allegations even if they were barred in their entirety by the negotiation agreement. We would have the right to put them in a pleading because that is not using them as evidence as that term is used in Federal

Rules of Evidence. That is an issue for trial. That is an issue determined in motions in limine before trial. But I would renew our point that we are happy to sit down with LBSF and discuss how some of these issues could be resolved if there is merit to their positions.

Now, another point that I think is very -- that we just recently learned that is very useful is that this is apparently a unique right on which LBSF is now relying. It is not present, apparently, and other swap agreements or negotiation agreements in connection with the resolution of other swap agreement disputes. Accordingly, the overarching policy concern that LBSF seem to be articulating in its papers would appear to be minimalized vis-a-vis what they originally seemed to posit it as.

I also just want to make one note. We do not concede necessarily that Capital Automotive or its counsel drafted this agreement in part. That may be the case; it may not be the case. I can't speak to that today. I can't speak to whether some specific language might have been added by LBSF or its counsel just so that's clear that we have no conceded that point, necessarily.

Okay. Now, let's turn to the merits of what's at issue right now. I have three types of arguments. You know, the first we'll call them situational, textural and practical. I think I've already addressed the practical arguments. But

now turning to the situational arguments.

The reason we -- the reason Capital Automotive was compelled to introduce these allegations into the papers, was because of what LBSF itself put into dispute in this action. Two things specifically I would note. In paragraph 29 of the motion to compel, LBSF specifically noted the issues present in its motion against Capital Automotive were, quote, "virtually identical", unquote, to those in connection with a motion to compel, performance under a swap agreement. LBSF lodged against the Metavante Corporation.

Now, Your Honor, I'm sure recalls that dispute. And central to that dispute was Metavante's conduct in terminating or not terminating its swap agreement with LBSF. And I won't go into detail of what happened in connection with that matter but Your Honor recalls that Metavante apparently was trying to time the market on when was the best time to terminate its agreement. And I believe Your Honor may have believed there was a little bit of bad faith inherent in that posture as well.

It was very clear given that LBSF alleged that the issues were virtually identical to the issues that are present here that we distinguish ourselves from the Metavante position. Here, by contrast, almost immediately upon the occurrence in event of default under the swap agreement, my client went out and acquired a substitute hedge clearly indicating that it was going to terminate that swap agreement.

Our client began discussions with LBSF as soon as practical following its bankruptcy filing and the record as to what happened after that is spelled out in Mr. Statle's declaration, Mr. Rosenfeld's declaration. The point simply is that we are not a party who sat on our hands and waited for the market to somehow change to perhaps put us in the money on some kind of swap. We began from the original -- from the original LBHI bankruptcy filing instead to begin planning for substitutes, to begin planning for termination and LBSF knew this.

The other reason we felt compelled to introduce some of the specific allegations and the declarations such as the amount of the settlement offers that were exchanged, was not to demonstrate, not to try to pin LBSF on what the value of the swap agreement was, but rather to show that Capital Automotive's positions, Capital Automotive's settlement offers were good faith offers. There was real money on the table. There was fifteen million dollars on the table. There was not offers of 200,000 dollars nominal pittances. This was real money as evidencing a real attempt by our client to resolve this dispute in early time.

Now, the other allegation that specifically puts at issue our client's conduct is paragraph 32 of the motion to compel which allege that Capital never attempted to terminate, never attempted to accelerate or otherwise offset or net out

its position under the swap agreement. Again, I think the conduct of Capital Automotive clearly belies that contention.

Even if, and I'm just assuming for sake of argument now, even if these allegations were barred by the negotiation agreement and barred at this time by the negotiation agreement, we have analogized to the at issue waiver under the attorney/client privilege, with cited cases under that doctrine from this circuit which we believe would support the notion that fundamental fairness sometimes overrides concerns such as privilege information. It override concern such as a private inter se a contractual limitation. You know, this is well recognized. We have, for example, United States v. Bilzerian from the Second Circuit where the Court noted, quote, "The privilege may be implicitly waived when defendant asserts a claim that in fairness requires examination of protected communications." Here by analogy, examining LBSF's claim in fairness requires examination of the entire factual picture that's at issue here.

Turning now to the textual arguments, I'm not going to quibble too much with the reading of the negotiation agreement that LBSF has made except I'm going to point out the important language they failed to note, which is that there is a carve out of what the term "communications" means.

And the term communications specifically is defined to not include, quote, "Any action, communication or statements

made by a party in connection with the party's enforcement of its rights and remedies under the swap agreement or this letter", that being the negotiation agreement.

Your Honor, respectfully, that is exactly what the communications we have raised were. They related to attempts by our client, by Capital Automotive, to enforce its rights to terminate the swap agreement upon the occurrence of events of default. Furthermore, it's broad to include not only statements by Capital Automotive, but statements by LBSF that relate to Capital Automotive's attempts to exercise its rights under the swap agreement.

Now, we are not taking the position that this means that any and all -- any and all statements made by LBSF could be used for any purpose. That is not what we're saying at all. We would concede, for example, that we could not use statements concerning quantification of those rights as some kind of binding evidence in this proceeding as it moves towards the entry of facts into evidence. But certainly, the statements that relate to the actual exercise of the rights themselves, are carved out of communications under this agreement and thus we think are not barred.

The only other point I would make, Your Honor, is concerning Rule 408. We have not argued that Rule 408 somehow is the governing standard here. We have raised Rule 408 to note that if there is a policy concerning the exclusion of

settlement negotiations, of compromised negotiations from evidence, that is the policy. The policy as our nation's jurisprudence has enshrined it is evidence by Rule 408. And that allows for the use of a lot of allegations for a lot of different purposes. That to the extent the negotiation agreement goes beyond that, it perhaps the reading that LBSF has given it is out of line with what our jurisprudence deems the acceptable and prudent limitations on the introduction of compromised negotiations into evidence.

And one other point, just the Reuling case, which is, I believe, the only case on which LBSF relies; two points I would make concerning that.

The first is that unless I am incorrect, that case was concerning motions in limine to keep evidence out as determined prior to trial. It wasn't an attempt to strike some kind of pleading lodged in the case that would have -- could have broader substantive ramifications.

The other point is that in the Reuling case the evidence in question was offered in the case in chief, the evidence that was alleged precluded was offered in the case in chief in an offensive way. Here, I would just remind the Court, we are only attempting to use these facts, these allegations, in a defensive manner and only because we are compelled to by what LBSF has put at issue.

And finally in that case, there was also -- the Court

noted that the reason it was excluding the evidence in part was because there was no separate wrong and there was no separate purpose to which the evidence could be put other than trying to prove liability on the primary claim, which is, again, not what we're trying to do here with anything they've identified.

In short, to sum up, we are happy as we have said for a month and a half now to discuss specific allegations, how those specific allegations could be tempered with LBSF. And now that the day before the hearing we were provided with the allegations in question, perhaps we could do that. But otherwise we would view this, their motion, as untimely and substantively improper. Any questions, Your Honor?

THE COURT: I think Mr. Gruenberger wants to respond to some of the things you've said.

MR. GRUENBERGER: Very briefly, Your Honor. I'm not going to get into whether or not this has to be a confidentiality agreement. That needs no response.

I think what you heard and what we all heard today is exactly what we were afraid of. Not only are they trying to use this in papers filed in court to win a motion, they're now trying to sway Your Honor by using the negotiations themselves against us to color your mind against us. That's more than just reading it, now they're saying, we're good guys, they're bad guys, let's look at the negotiations that we're not supposed to refer to. That's what they're doing and that's

what this is all about.

THE COURT: I actually disagree with that. I think that what I heard in argument is an attempt to differentiate this situation from the situation that was litigated in Metavante. And whether that's a fair use of the negotiating history, I don't know, but I don't -- I don't draw the conclusion that you've just asserted that they're trying to paint Lehman as a bad guy. I think instead, they're trying to paint themselves as endeavoring to reach an accommodation and that it took some time.

MR. GRUENBERGER: Your Honor may draw that inference. I respectfully disagree and maintain our position. I think the position --

THE COURT: But let's understand what we're dealing with here. That's one of the reasons why I asked some threshold questions. With the -- mostly for courtroom, we've spent a considerable amount of time debating an issue that is clearly important but let's look at the context in which we're debating it. This is not the Dartmouth College case. We're not debating the sanctity of contract as an issue of seminal law of the United States. We're talking about something that really is a one-off agreement that I suppose Capital Automotive now wishes it hadn't proposed in the first place. But you know what, they did. This is not a governing issue in this case. You've already acknowledged that all of these counterparty

negotiations are going on without such agreements in place which means that negotiations without this agreement would be before me in multiple cases.

MR. GRUENBERGER: That's correct, Your Honor. I -- you asked me a question whether this was the standard that the debtors use and I said no. There are confidentiality agreements, as you know, that come before you in other context, but this is not the standard. But you heard counsel, when they think that they can get away with making statements like, well, we really don't know whether we drafted it, so we're not going to agree or disagree. You notice that that was -- Your Honor just said they drafted it. They walked away from that. They're not agreeing with anything. They accuse me of not mentioning the clause in the -- on negotiation agreement that says that, yes, it's legitimate to try to use negotiations for enforcement purposes. They're choosing to not mentioning that. Your Honor knows I mentioned that and we don't have to go check the transcript, it's all over that. And I mentioned that the enforcement could not be possible because what they're trying to do to enforce doesn't exist as a right under the swap agreement. So I think this is a question of how slippery a slope are we going to allow to be used here. They said that the case was only an evidentiary case. The case we cite in the District Court of Connecticut. That came up on a motion to amend a pleading. The case is only three pages long, Your

Honor. It's not hard. I'm sure your clerk will read it. And it's there. Whatever the case stands for, it stands for that that use of negotiations was stricken. It wasn't permitted. That's what we're talking about. How far can parties go freely?

Of course, this is not the Dartmouth College case. Of course not. Even I in my rhetoric don't go that far. Never close.

THE COURT: You almost did. You almost did as you were closing your argument. You were suggesting that this was a case about the sanctity of contract.

MR. GRUENBERGER: And I still believe it.

THE COURT: That is in fact the Dartmouth College case.

MR. GRUENBERGER: Yes, it is, Your Honor. But this is only in a very small, small universe. That was in the 18th century, Your Honor, at the start of this country. And when Justice Marshall wrote that decision, he was writing on a clean slate. We're not writing on a clean slate. Contracts meant something after that case and they still mean something and that's why I submit, Your Honor, that you should enforce it against Capital Automotive. And I thank you very much for giving me the opportunity.

THE COURT: Okay. Apparently, that's not the last word.

MR. REISS: Your Honor, with your indulgence, one

point just on the Reuling case just so my reading of the case is not besmirched; 407 F. Supp 2d, 401, 402 clearly identifies that the issue was before the Court on a motion in limine. That's all I have.

THE COURT: All right.

MR. REISS: Thank you.

THE COURT: It's lunchtime. It's actually twenty minutes past lunchtime. And we have some other matters from the morning agenda which will be heard at the start of the 2 o'clock calendar.

As it relates to this motion to strike, I'm going to take some time to review the entirety of the negotiation agreement not just the parts that have been excerpted although I think if I read all the excerpts it's probably the whole agreement. And I'm going to take this under advisement for disposition if it hasn't become moot by that time on February 10 at the time of hearing, the motion to compel performance.

Notwithstanding the rhetoric, I question the need to hear this motion to strike as a freestanding piece of motion practice on an already crowded omnibus docket. And I need to sift the relative importance of this issue in the context not only of the dispute with Capital Automotive, but in the context of the case as a whole.

I am left with the impression that this is notwithstanding the characterization by debtors' counsel much

ado about not very much. I think it would be highly desirable for the parties to meet and confer in good faith in accordance with the proposal made by counsel for Capital Automotive to endeavor to reach by consensus a molding of the pleadings and the declarations to the obligations undertaken in the negotiation agreement. To the extent that there can be a rewriting of those declarations and a truncating of them in a manner that makes them congruent with the agreement, that would be desirable. If that can't be done, I'll deal with the motion on February 10 as a motion in limine which is what I believe it is.

There seems to be little dispute as I have heard the argument that the language of the agreement says what it says, that it's plain, that there's no ambiguity and that there's no need as a result to get to the intention of the parties in having prepared in the first instance. It does not purport to be a confidentiality agreement but it does by its terms limit use. The question that's still before the Court is whether the use that has been made of the material set forth in the two declarations constitutes a fair use of negotiation history consistent with the terms of the agreement. I'll give some thought to the analogy made to an at issue privilege waiver which I view as something of a stretch, but I'll at least give it some thought.

What it basically is is a plea for mercy by a lawyer

who represents a party that now wishes it didn't enter into a particular form of agreement.

As Mr. Gruenberger has articulated with considerable flourish, this is a contract. It should be enforced. But the question still exists as to what it means and how it should be applied in these circumstances. I'll do that if it's necessary on February 10 but suggest with emphasis that the parties might do well to take this problem away from me by reaching an agreement before February 10 so we don't have to spend anymore time on what I think is an unfortunately small point. We're adjourned till 2 o'clock.

(Recess from 12:53 p.m. until 2:00 p.m.)

THE COURT: Be seated, please.

MR. WAISMAN: Good afternoon, Your Honor. Shai Waisman, Weil Gotshal & Manges, on behalf of the Lehman debtors.

Your Honor, as I indicated at this morning's session, we filed an amended agenda letter last night reflecting that two of the adversary proceedings, numbers 16 and 17 of the prior agenda letter that were scheduled for this afternoon's session, have been further adjourned. That left one adversary proceeding to proceed this afternoon at the 2 o'clock calendar.

If we could, there is a request to proceed slightly out of order as to that adversary proceeding. I understand the parties have agreed on a discovery schedule and simply request

to hand up a stipulation, so it should be very -- a relatively quick matter.

THE COURT: That's fine.

(Pause)

MR. ALBANESE: Good afternoon, Your Honor. Anthony Albanese from Weil Gotshal, on behalf of the debtors.

This is the adversary proceeding of Federal Home Loan Bank of Pittsburgh versus various entities and LBI, Woodlands and Aurora Bank. We were before Your Honor on December 11th with respect to all of the defendants' motions to dismiss the proceeding. Your Honor had decided to defer the decision on the motions to dismiss and allow the parties, at plaintiff's request, to conduct discovery. And Your Honor indicated that we could have sixty days for discovery.

So the parties have entered into a scheduling stipulation which would provide that the discovery would be completed by March 1st and that any supplemental papers with respect to the motions that are pending would be submitted by April 2nd and that any oppositions or objections to the supplemental papers would be filed by April 19th. And all the parties have agreed to the stipulation, which I can hand up to Your Honor.

THE COURT: Sounds fine.

MR. ALBANESE: Thank you, Your Honor.

THE COURT: If it's as you describe, it's approved.

MR. ALBANESE: Okay, thank you.

THE COURT: And that can be handed when all matters relating to the afternoon calendar are submitted.

MR. ALBANESE: Okay, thank you, Your Honor.

THE COURT: And everybody who's involved can go home.

UNIDENTIFIED SPEAKER: Thank you, Your Honor.

MR. WAISMAN: Thank you, Your Honor. We would now jump back to this -- the agenda for this morning, which we didn't have an opportunity to close out. And I believe the next matter on the calendar is reflected in agenda item number 10, motion of Sea Port and Berner to deem proofs of claim to be timely filed.

THE COURT: Good afternoon.

MR. DONOHO: Good afternoon, Your Honor. It's Christopher Donoho of Lovells LLP, on behalf of Sea Port Group Securities, LLC and Berner Kantonalbank jointly. And the reason it's a joint motion is these are buyers and -- a buyer and a seller of some Lehman programs securities. And I think from your nodding that you have read the papers and understand that this is --

THE COURT: I understand the papers and I understand that a mistake was made with respect to the second page of the spreadsheet. And it hardly seems excusable, but let me hear you tell me why it should be.

MR. DONOHO: Okay. Not a great start for me, but I --

THE COURT: No, it's --

MR. DONOHO: -- hope I can convince you.

THE COURT: -- it's not a great start.

MR. DONOHO: Well, as you -- well, let me start off by saying that we are talking about three trades that were on that second page; it's a total of a little bit less than five million dollars of claim amount for those three trades in the aggregate. And I'll go over briefly the facts for you, although I won't belabor them because obviously you're up to speed. But I would also note that Jonathan Silverman, who's the general counsel of Sea Port Group, is here today. And on the phone is Samuel Stucki of Berner Kantonalbank -- sometimes we call them BEKB -- is on the phone as well.

And, I guess, taking it from sort of the brief history, on September 4th there was the confirmation of the trade; it was two separate pages, as you know: eight on one page, three on the other. The eight -- well, essentially seven of the eight closed a few days later, as was contemplated. There was some confusion about a currency issue on the other one; that then closed on September 30th. At that time, there was -- sort of first raised the question of those other three trades between the back offices, not involving the traders who were directly involved. The BEKB back office said what about these other three trades. The Sea Port back office said we don't recognize those three trades.

And that -- it then just sort of fell into the ether for a short period of time, when on November 5 the BEKB trader contacted the Sea Port trader and said we have these other three trades, we want to close on these, what happened. It was then it was realized that, you know, that they had not closed on those three trades and the November 2nd bar date had been missed. I don't think that those facts are disputed by the debtor, and I think they sort of speak for themselves.

But what I wanted to talk about was whether the failure to file the proof of claim for those three securities by the November 2nd bar date constitutes excusable neglect.

THE COURT: Let me ask you this question.

MR. DONOHO: Yeah.

THE COURT: At this moment --

MR. DONOHO: Yes.

THE COURT: -- who owns the securities? Was this a failed trade, or did the trade go through and the proof of claim fell between the cracks in the hands of the owner?

MR. DONOHO: It's a great question, and the answer is, I think, unsettled. The claims have not -- the trade has not closed. The seller would say that the obligation and the ownership interest is in the hands of the buyer and it was their responsibility. The buyer would say that, because it never closed, the responsibility for filing the claim is in the hands of the seller. That's an issue between the two of them

that remains unresolved. And the hope is that if there's a favorable outcome from this late-filed claim motion, that that issue will no longer be an issue and then it can close and everyone will be happy. If we get an unfavorable result from this joint motion, then that question becomes the core question as between those two parties.

THE COURT: I'm glad I asked it.

MR. DONOHO: But it is the, sort of, key question, because you have two parties who are getting along for purposes of bringing this motion, but behind the scenes are both pointing at each other saying this is your -- this is not our fault, this is your responsibility. BEKB would say on their records, their systems, once they have a trade confirmation it gets a different coding, it gets treated differently and it's treated as sold, and they don't keep records of it. The buyer would say -- well, here it got mistaken, so it didn't get coded that way. But the buyer would say until the trade closes we don't have title, and without title we can't file a proof of claim.

So you have this push and pull. And that's why I say -- that's why this is such an important hearing, because that issue will go away if we get a favorable result. That, to me, is part of the prejudice argument of, sort of, the four-prong test as it relates to excusable neglect. To me, the prejudice issue sort of falls in, sort of, three categories;

one of them is just that. There's a five million dollar issue that we're looking at, which will lead to litigation if this isn't resolved. On the flip side, as to the Lehman estate, five million dollars is below a rounding error, given the size of the estate.

I think the other two points to make on prejudice -- the first one is that this five million dollars, being a small amount for Lehman, is a lot for these parties and potentially people's jobs are on the line. Like, this was a mistake that someone is having to take responsibility for; they haven't had to face that judgment, I guess, until we have a decision here. But potentially, you know, there could be consequences. This is real money for both the buyer and the seller.

The other point I guess I would make is that the prejudice for a Lehman programs security, which this is, seems that -- seems, to the movants, that these are the kinds of securities that were known by the debtors. It's not like the Pacific Life case, which you are obviously still considering. But there you had a derivative with a guarantee claim, and it's hard to say whether that guarantee claim was known, was part of the books and records, was easily identifiable. These are Lehman programs securities where there was a guarantee claim form that was sent out and available. The existence of these claims should have been very well known to the debtors. So it's hard to see how it can be prejudiced by having those

claims allowed, which they were probably counting on being filed.

The three other factors: Delay: We have a forty-two day delay. As soon as this became clear that it was a problem that was not going to resolve itself, we put the motion together, filed the claims, came before this Court.

Good faith: I don't think anyone questions that -- everyone recognizes something terrible happened here, and everyone's been acting in good faith to get this resolved.

The last factor, and we understand that they're not, sort of, considered as equally weighted factors, is, sort of, the reason. And I think the facts set forth the reason. But what I wanted to do was really contrast this with some of the other cases that either they've cited or we've cited or that you are considering now. I think one of the cases that the debtors cite is the Enron Midland Cogeneration case. I think this is very different than that in the sense that there was a six-month delay; people knew about, or should have known about, the claim that they could have filed, and they really sat on their rights. We don't have that here. We have people who acted promptly; as soon as they became aware of the problem, they acted.

I think the case that the debtors are really relying on, and the one that's probably sticking with you, is Pacific Life, where you have two people in the same institution, each

charged with the responsibility, one doing European claims, the other one doing U.S. claims. You have a U.S. guarantee on the European claim. Both people look at each other and say this was your responsibility, what you referred to as the fly ball that lands between the two outfielders.

And I think this is different, and the reason I think it's different is those two outfielders play on the same team; they're managed by the same coach. And that ball fell between the two of them. Ultimately, the manager of that baseball team had the responsibility to tell the center fielder, or the left fielder or the right fielder, whose responsibility it is to take control of the ball; that's an indeterminate.

Here you have two different organizations, BEKB, which is a Swiss entity which doesn't normally trade in these kinds of U.S.-type securities, and a U.S. entity that doesn't have this trading partner very often, speaking primarily different languages, dealing in securities that they don't spend a lot of time with, and they have a mistake and the ball falling between them, so to speak; they're on different teams and they have different managers.

And so what I think was really underlying your concern in Pacific Life is the manager of that baseball team had the ability to control their actions and didn't do a good job of it. And you haven't ruled against them, so I'm not saying that -- I'm not trying to prejudice your decision there in any

way. But here you have a very different situation because you don't have one manager; you have two different managers. And I think this is a lot more like a situation like PB Capital or Banesco where you have people doing their jobs as best they can and making unfortunate slip-ups, but the consequences are so dire on the one hand and so mild on the other hand that we would hope that this would constitute excusable neglect.

THE COURT: I need to understand a little bit more as to why the facts you have laid out, in what I'm afraid is a tortured metaphor that I started last time we had a hearing with the subject of excusable neglect, gets us to the point of exercising discretion in your favor. It's one thing to pick up the metaphor to have two players who see the ball and drop it; it's another thing to have players who are drinking coffee in the dugout. Here, we have players who are closer to the second imagery. They didn't see it. In fact, they weren't even looking. They weren't playing. They didn't know that there were three securities on this second spreadsheet.

So in some ways you can say it's a harder case for you, because there isn't even an effort at diligence. There is knowledge of the bar date on the part of both seller and buyer but a failure to recognize that these are securities that either party needs to attend to for purposes of preserving rights. I'm troubled by that.

MR. DONOHO: I -- I don't know that it's laid out

expressly in the affidavit in a way that addresses your question, but I think it's implicit in the affidavits that this is an unusual situation, these are unusual circumstances. And I can sort of flip that into two categories. First off, I don't think the seller has much experience in U.S. bankruptcy matters and understands the idea of who has the responsibility for filing claims. And they coded these securities, once they had the confirmations, as sold. So in their minds, they were aware of them; they just didn't know that they were responsible, or could be responsible, for filing claims.

On the other hand, you have a buyer who doesn't -- you know, doesn't -- didn't have that extra layer of check to make sure that every time a trader gets a two-page spreadsheet page of securities that both pages make their way through. I am -- you know, I am -- I understand that this kind of thing doesn't happen. And so this is so unusual that to have the, sort of, requirement that they have this extra layer of protection built into their own system is sort of what I think you're saying should have been there. And they don't have that; maybe they will after this, but they didn't have it in place at the time. And so the ability to correct for those kinds of mistakes just simply wasn't there.

And, again, I don't think this is so different ultimately than PB Capital or Banesco in the sense that in those situations where you ruled in their favor, someone either

misread the form or saw the list of securities, saw they were on there, and didn't go back and check the second time when the new list came out. In both of those instances, someone could have discovered it but didn't because either they misread it or they didn't follow up. And I think that's no different, really, ultimately than what we have here where you have a seller who mis -- potentially misinterpreted their responsibility, and a buyer who didn't follow up because they haven't had the experience that tells them you need to follow up.

THE COURT: I guess here's the distinction in my mind: In the other two examples, there were parties who were scrupulously endeavoring to comply with the bar date and exercising due diligence, but there was a mistake, and the mistake in both instances occurred within highly respected law firms that were doing the best they could under the circumstances to get a job done by a hard deadline that they recognized.

In this instance, there seems to have been -- whether it's excusable or not we'll have to get to in a minute -- a failure to recognize the obligation. There was a failure to recognize the obligation on the part of the seller because it was coded as sold. So even though there -- and I have no idea what this institution's knowledge of U.S. bankruptcy practice may be. And, frankly, even if it were sophisticated in U.S.

bankruptcy practice, the Lehman case is, for all practices cases, sui generis as it relates to the proof-of-claim drill, particularly as it affects securities.

So I have no idea what they did, except they didn't do anything because they didn't think there was anything to do, because they'd sold the securities.

MR. DONOHO: Your Honor, a response that I think answers that question is these are not parties who were acting carelessly. As the debtor notes in its pleading, both BEKB and Sea Port filed proofs of claim on their own behalf in other instances with respect to other securities. So they were aware of the bar date, knew their responsibility and acted in accordance with that. This is the exception to that where, again, for the reasons they set out, either they didn't know it was their responsibility or they didn't realize they had it to do. But it wasn't like they were flaunting this Court's order that says you have to do.

THE COURT: No, I'm not suggesting for a minute that that's what I think happened. I'm really talking about a blind spot. I'm talking about something that's completely missed. It's the intersectional collision and you didn't see the stop sign at all, but the stop sign was there and you had a collision, but you're at fault. It doesn't mean that you wanted the accident to happen; it's that you were texting or doing something else, your mind was elsewhere.

And, again, this may not be a completely apt image, but my image of this is that the seller didn't even think about filing a proof of claim as to the securities, for the reasons that you've described, because the securities were, for their records, sold. As a result, it was, in their mind, the buyer's responsibility to do whatever needed to be done to protect claims as against this estate. And from the buyer's perspective, they didn't see the second sheet. Now, the second sheet was there to see, the securities on the second sheet were part of this eleven-security trade, but because the second sheet was missed it's as if they weren't there at all.

So the real mistake, I guess, we're talking about is the buyer's back-office mistake in missing the sheet and in failing to pick up the fact that mistake was made. That's how I'm seeing it.

MR. DONOHO: Your Honor, I guess I don't fundamentally disagree with the facts as you lay them out; it's really a question of degree. And I know you haven't ruled in Pacific Life, and I know you have ruled on PB Capital and Banesco, but, to me, in PB Capital and in Banesco you have something that could have been caught, but either they didn't read it closely enough or they had a misunderstanding or they didn't look at it at the right time. In each case they were acting in good faith; they just made a mistake.

And I would say that in this situation, you have --

obviously the facts are different, but the good faith, the lack of prejudice and the effort, I think, was all there. And, again, they acted very promptly to respond.

And I think one other point I guess I would make, and you're going to say this isn't quite what you were asking me but I didn't want to miss this point: I think one of the other factors on prejudice is the sort of -- the fear of the flood, right, the other claims that come in front of you. But from my understanding, you've had six or so motions to allow late-filed claims and a host, and maybe there are hundreds, of claims that were late-filed. I don't know where those people are, but they should be here in front of you on motions to have late-filed claims if they believe they have good grounds to do so.

You have six movants who came in front of you saying we made a mistake. I don't think that allowing this claim, under these circumstances where people's jobs are on the line and you're talking about a rounding error in a case of this size is going to lead to the flood that's going to cause this Court to be stuck with lots of people coming in and saying me too, me too. Their chance to file motions really has come and gone. We acted as promptly as we possibly could under the circumstances. And, again, I don't think the prejudice is there.

And I know that the factors aren't weighted equally, but here the prejudice on the movants' side is so great

relative to the size of the estate and the facts at play, it has to be considered.

THE COURT: Okay.

MR. DONOHO: Thank you, Your Honor.

THE COURT: I understand your argument, and I should hear from Lehman.

MR. WAISMAN: Your Honor, Shai Waisman for Lehman. I think what we've just heard is a very understandable and laudable slight of hand embracing as vigorously as possible Banesco and PB Capital and running away as much as possible from the facts of Pacific Life. Of course, we view the world very differently.

And to further torture Your Honor's analysis -- analogy in the baseball context -- you know, they weren't just, in this context, sitting in the dugout drinking coffee. Here they kind of actually pointed at the ball till it dropped on the ground, left, and didn't pick up the ball till the very next game.

Both parties here don't deny they received actual notice of the bar date. What happened was this second page didn't go through and Berner's back house contacts Sea Port and says urgently there's a mistake here, you need to get to us because there's an error. And what happens? Nothing. Nothing happens until Berner goes at them again and says you need to get back to us. And then people realize something went wrong,

and then they take an additional -- I think it's over thirty days; it's set forth very clearly in the affidavits -- to actually consider filing a proof of claim. And where we end up is that Berner, who at all times, it's not admitted on the record, owned the security, blows past all the bar dates and, well after the securities program bar date, determines to file a proof of claim.

It owned the securities as a result of the mix-up on the trade. It owned the securities before the bar date, at the bar date, to this day -- in response to Your Honor's question, to this day, owns the securities, and offers really no excuse as to why it did not file a proof of claim. And not understanding the procedures doesn't excuse one from the Court's bar date order, especially since it was so explicit.

And all of the commentary on the record that everyone acted as soon as they realized that there was a mix-up in the transfer of securities is completely unsupported by the two affidavits, which make clear that people sat around. They knew there was a screw-up in the transfer; they sat around. They knew they missed the bar date; they still sat around. And to this day we haven't heard any excuse for that.

And there's -- an argument's been made that, well, it really doesn't matter because at all times Lehman knew about these securities. Well, at this point that's not really relevant. If Your Honor recalls, the reason we established the

programs securities bar date was because these were securities that Lehman, Lehman the estate, the entities before Your Honor, actually didn't know. These were issued by affiliates in foreign proceedings, and we had no record.

So we had to give more time to prepare a list, set them out and encourage people to file claims, and that's what was done here; these were the B.V. notes which were guaranteed by LBHI. But they got the benefit of a later bar date. And to say that "They were known to us" doesn't excuse them from failing to file even by the later bar date that these securities provided.

I think we're getting -- I'm sorry, going back to Banesco and PB Capital, as I recall Your Honor's reactions to those matters, Your Honor first of all was very, I think, aware and appreciative of the fact that, as Your Honor just said, everyone had their eye on the ball, they were working diligently. I think there was also an element there of confusion over several bar dates and very detailed procedures as to each of those bar dates. And the confluence of those two, I feel, persuaded the Court that those parties had established excusable neglect.

That is very different from the circumstances in Pacific Life, and now in Sea Port, where there isn't even an allegation of confusion over the procedures; there isn't any confusion over the bar date. It is we missed the bar date

because we did not follow the instructions that were provided to us, that we had full knowledge of, and it's because of an error on our end, not the debtors' end, on our end, and because we messed up, and there's a whole host of reasons we did, and we interact with other parties all the time, and it's all very confusing, and, by the way, it's an exception because no one else will be like us; that doesn't cut the mustard.

The line of cases in the Second Circuit, I think, make clear that the standard is strictly construed in this circuit. And mere neglect -- and I'm not sure this is even mere neglect; I think the absence of action during both intervening periods rises beyond mere neglect in this case -- I think, precludes the relief sought.

THE COURT: What do you say about the flood?

MR. WAISMAN: What I say about the flood, you know, we didn't push the flood argument with respect to the last several motions; we still don't push the flood argument. We merely apprise the Court of how many late-filed claims there were. But the flood was used very interestingly in the presentation. It wasn't, well, there's no prejudice, there is no flood, so that weighs in our favor. In fact, the argument was, as I read it, there hasn't been a flood, we're here early and therefore, no matter what the reason is, we get to file a late claim. That isn't the standard. I think it's quite the opposite. If you establish the basis for a late claim, you then consider the

flood argument. And I think here it was turned on its head.

And if we permit this late claim on these specific circumstances, we essentially are left simply to any further motion. Well, how many days after the bar date do they come? Because at this point the reasons don't really matter. At this point, if you made an error on your end, not because you didn't receive notice and not because you didn't understand but you just messed up, back office, two people didn't speak to each other, you didn't follow any sort of procedures to make sure your claims were transferred, you stuck it in a drawer and forgot about it and just found it -- those are all perfectly fine reasons if we accept this rationale -- at that point we're just going to be counting days on a calendar as to how far away we are from the bar date and whether the timing is -- you know, has gotten beyond us.

And at this point we stand here nearly 120 days after the original bar date; I think it was a little over 70 days from the securities program bar date. There was even, in terms of timing, a delay in the bringing of this motion. So I'm not sure it cuts in their favor. But in any event, the prejudice flood argument is not as set forth in Sea Port's presentation.

THE COURT: Okay.

MR. WAISMAN: Thank you.

THE COURT: Mr. Donoho, do you have some more?

MR. DONOHO: Just very quickly to clarify on a couple

of points. I guess I take offense to Mr. Waisman's opening comment that this is somehow a slight of hand. I think, if anything, this is a fairly candid admission that something terrible has happened and we're trying to correct it. We've been very open and honest about it.

He also refers to an absence of action. I don't think there was any absence of action. I think people acted as rapidly as they could once they realized there was a problem.

And his reference to looking at today as the reference point for how far we are past the bar date is really unfair. The claims were filed on December 14th; the motion was brought on December 11th. Those are the dates you should be looking at, not from today.

We acted as fast as we could; we were just working within the Court's calendar. We didn't want to bring this on, an order for shortening time. We didn't think that was a good use of the Court's calendar. Thank you, Your Honor.

THE COURT: Okay.

When I looked at this motion in connection with preparing for today's omnibus calendar, I recognized that there were some overlaps with the Pacific Life case that has been referenced during the argument. Because the Pacific Life case is still under advisement, I'm going to take Sea Port and Berner's motion and place it in the same spot, but it's not going to stay there all that long. I think it's actually

helpful to the process of attempting to identify some benchmarks for excusable neglect, in the context of a proof-of-claim process that is here so complex, to have a couple of examples to consider at the same time.

I'll be deciding this probably at the February 10 omnibus hearing date. And to the extent that someone would like to advise Pacific Life, if they're not monitoring the case, that they'll likely have an adjudication at that time, I would appreciate debtors' counsel doing that. If for some reason there's a change in plan because of workload or other reasons, I'll let you know, but otherwise let's assume that there'll be a decision on both of these pending matters at that time.

MR. DONOHO: Thank you, Your Honor.

MR. WAISMAN: Thank you, Your Honor. And truly, truly, no offense meant by "slight of hand" to my esteemed counsel, honestly; more meant to emphasize trying to draw lines between the various other motions that had been filed and decided or adjourned by the Court.

THE COURT: Okay.

MR. WAISMAN: Next matter on the calendar, Your Honor, appears at number 11: motion of the debtors for establishment of procedures for the debtors to compromise and settle pre-petition claims asserted by the debtors against third parties.

As Your Honor is well aware, this was a global

enterprise with a very large presence in the U.S. The debtors conducted a great deal of business and had many customers and vendors with whom they dealt with on a daily basis. The debtors have identified certain claims they have against third parties, and continue to identify those claims. Most recently, Your Honor may be familiar with a stipulation entered into between the debtors and LBI on the pursuit of certain pre-petition loans to employees, just one category of the type of claims against third parties that these debtors would proceed with.

Given the de minimis amount of some of those claims, any recovery would be severely diminished, if not entirely diminished, by the need to prosecute individual motions with respect to each. And as a result, the debtors proposed and worked hand in hand with the creditors' committee to prepare this motion outlining procedures by which they can settle pre-petition claims, and I think the procedures are rather explicitly set forth and rather standard.

One objection was filed prior to the January 6 expiry of the objection deadline, and that was U.S. Bank's "limited" objection. I found it difficult to discern how it was limited. In reading the objection, it in fact suggested that none of the relief was warranted and that, in particular, any settlement that may affect any trust requires a motion on notice with an opportunity for all creditors to respond, quite contrary to the

spirit and purpose of the motion.

I am at a loss as to what the aim of the objection was if U.S. Bank as trustee, as we set forth in our reply, has rights vis-a-vis the beneficiaries of trusts pursuant to the documents underlying the trust. Those agreements remain in place and they have whatever rights they have. The debtors, to the extent they even have claims against U.S. Bank or any of the beneficiaries of a trust, would be negotiating directly with those parties. And the rights those parties have vis-a-vis one another are governed by whatever agreements and documents govern those relationships and should not be an impairment to this administr -- the administration of this estate being efficient and cost-effective, as well as not a burden to the Court's docket.

I do note that the U.S. Bank objection did make clear that the end game of any settlement and motion that would be required, as per U.S. Bank's view, would require an exculpation of U.S. Bank, and perhaps that was the motivation for the objection.

With that, there were no other objections. I know -- I believe U.S. Bank is here. I'll cede the podium.

THE COURT: Fine.

MR. PRICE: Good afternoon, Your Honor. Craig Price from Chapman and Cutler, on behalf of U.S. Bank.

First of all, I'd like to apologize for any confusion

we have caused to debtors' counsel and to the Court with our papers, but I think our objection was a limited objection. U.S. Bank is the trustee to over 800 complex -- I'm not going to repeat the entire papers.

THE COURT: No, it's not that. What is a limited objection? I don't even know what a limited objection --

MR. PRICE: Well, I think --

THE COURT: Isn't an objection an objection?

MR. PRICE: It's an objection, but it's limited in scope.

THE COURT: You're trying to make it seem like it wasn't a really --

MR. PRICE: It's not --

THE COURT: -- hard-nose --

MR. PRICE: No, no, right.

THE COURT: -- hard-fighting, bare-knuckled objection? It's kind of a soft objection?

MR. PRICE: Well, it's limited in the sense that, you know, we're fine with the settlement procedures that the debtors have put forward; we, in fact, encourage it. We don't want to hinder that process. In fact, we'd like to settle some of our own claims. So it's not an objection to any settlements. But we think that the claims that they are attempting to settle are quite broad. We don't know exactly every kind of claim that's covered by it.

So U.S. Bank is a gatekeeper for its beneficial holders as well as itself. We're just asking that, to the extent that there are any claims that are related to a U.S. Bank trust, which is, you know, a small world of potential claims, that those -- that any settlements with regard to those claims -- that we're provided notice and a meaningful opportunity to review the settlement just to make sure that other beneficial holders are given the rights and that, you know, we can look at the documents and make sure that everyone's rights are maintained.

I think it's a quite limited-in-scope objection. That's what we're asking is that, to the extent it's related to an indenture or any other type of agreement or document that U.S. Bank is the trustee to, that we're provided notice of that settlement and that we're given an opportunity to review it and make sure that everyone that would be affected is at the table.

And so that's, I think -- I don't know if that answered your question about why it's a limited objection, but it's quite narrow in scope.

THE COURT: It sounds like it's narrow, as you describe it, but my interpretation of it is that it's incredibly cumbersome in its potential application and of no particular value. If in fact people do get notice, what are they supposed to do with it? We're talking about recreating a process that from the very beginning of this case was one where

individual creditors were stepping forward for 2004 exams for the rights to be heard with respect to basically everything that was going on at the time, and the creditors' committee ended up as the principal clearinghouse for creditor concerns.

To the extent that there is some requirement that U.S. Bank as trustee, as opposed to any other trustee, or as opposed to any other party-in-interest who might be affected, is somehow entitled to special notice, to me, is a curiosity and I don't understand it. So maybe you could explain why that's necessary --

MR. PRICE: Well, it's necessa --

THE COURT: -- why you as opposed to any other fiduciary, why you as opposed to any other party-in-interest.

MR. PRICE: Well, I guess us because, one, we're here. But, two, you know, U.S. Bank is just trying to perform its functions as a trustee and make sure that all beneficial holders are given the rights that they're entitled to.

And so, you know, the question of whether that should be granted to all trustees, I can't answer that question. But we think that it's part of our role to look at the -- any type of agreement that's made with the beneficial holders, to make sure that those rights are spread across everyone equally and everyone is treated fairly and equally. And that's what we see as our role and our job.

THE COURT: Okay. I just don't understand how it's

going to work, but maybe if the debtor's willing to do that, that's, I suppose, okay.

MR. PRICE: Well, I don't think they're willing to do it, so --

THE COURT: Well, I'm not surprised.

MR. PRICE: -- because -- that's why we're here.

THE COURT: So let me find out why they don't want to do it.

MR. O'DONNELL: Your Honor, Dennis O'Donnell, Milbank Tweed Hadley & McCloy, on behalf of the official committee of unsecured creditors.

Just rising to confirm that we did in fact work hand in glove with the debtors on this and believe that the procedures, as proposed, are entirely appropriate. They're consistent with other procedures that have already been entered in this case that have proven effective to permit the committee to review settlements and other transactions of this type.

And we too are puzzled by U.S. Bank's objection. I think it goes so far as to suggest that the thresholds which are integral to the protocol be eliminated, which would eviscerate the whole point. The whole point here is to allow the debtors to settle some things entirely on their own and some things in cooperation with us, and only need to get to you at a twenty-five million dollar level, which we believe is entirely appropriate.

So we think that objection should be overruled and the motion entered as proposed.

THE COURT: Okay.

MR. WAISMAN: To answer Your Honor's question, we can't agree. First, we don't understand -- I don't understand what may or may not affect a trust; I don't understand what may or may not affect U.S. Bank.

Secondly, the -- secondly, it would be impossible to police; we would have to get into the essence of every single one of these settlements that we would rely heavily on the businesspeople to keep down the administrative costs of this estate; we would have to get involved and figure out whether they have the potential of effecting a trust.

And thirdly, as I think counsel was basically saying, they would like to police all settlements. Well, you know, I'm not sure that that's appropriate or the estate's problem. If we enter into a settlement with a beneficial holder, and that beneficial holder was supposed to tell the other beneficial holders or was supposed to tell the trustee under the indenture, well, those parties have rights one against the other and that does not involve the estate and should not hold up the administration of the estate.

MR. PRICE: I would just add, Your Honor, we're not trying to eviscerate this process. I mean, we want it to go forward. We're just concerned with those particular claims

that are being settled that relate to a trust that's being administered by U.S. Bank.

And to the point that it's impossible to know which of these involves U.S. Bank, I mean, U.S. Bank's name is all over these documents. So to the extent that they were settling with a beneficiary, it would be in the documentation that U.S. Bank was the trustee.

I don't think it's an impossible burden for the debtors to police or to inform people to the extent that it's U.S. Bank that's being -- that's involved. We need to give them notice. And we're not trying to police all settlements; we're only, one, trying to police those that involve U.S. Bank-administered trusts.

And to the extent that, you know, we review the settlement agreement and all parties that should be there, their rights are being protected, we're fine with no Rule 9019 motion being filed; it doesn't need to be. But to the extent that there are instances where someone's rights, who is not at the table, is being affected, then -- and there are objections to that, then we would inform the debtors and we would hope, then, that 9019 motion would be filed.

So, you know, it could be that there are no claims in this world of the -- that relate to a U.S. Bank trust, and it could be two. We just feel that in those instances they should contact us, give us notice and so that we can perform our job,

our function.

THE COURT: The objection, limited or otherwise, of U.S. Bank is overruled and the motion is granted. Based on my review of the motion, the comments of the creditors' committee that participated in developing these procedures with the debtor, and the debtors' papers and argument made today, I am satisfied that these procedures, particularly in the context of this case, are appropriate and that no single party-in-interest, whether a trustee or otherwise, should have special rights of oversight in connection with these procedures. Indeed, the procedures are designed to eliminate the need for such administrative oversight for those settlements that fall within certain predetermined ranges of materiality.

U.S. Bank National Association, as trustee, will simply have to be as vigilant as it thinks it needs to be to protect its beneficiaries in the various matters in which it has an interest. And I don't believe that U.S. Bank is entitled to any more rights, even though they filed a limited objection, than any other comparable fiduciary in this case.

MR. WAISMAN: Thank you, Your Honor. I believe the final matter on the calendar this afternoon is item number 12 on the amended agenda letter: debtors' motion for approval of claim objection procedures and settlement procedures.

As Your Honor is well aware, all of the bar dates have now passed. In response, over 65,000 claims have been filed

against these estates, and the debtors are preparing to embark on the claims resolution process. We have filed, and will continue to file, additional pleadings in order to streamline the claims process that we feel would otherwise overwhelm our resources as well as the resources of the Court, and this motion is one of those meant to streamline the process.

Also, as indicated in Mr. Marsal's state-of-the-estate presentation, I believe, at the last omnibus hearing, we do hope to shortly file alternate dispute resolution procedures for all of the claims that have been filed, or a large subset of those claims.

But getting to the motion at hand, Your Honor, this is what is somewhat routine in this and other districts, a motion for authority to file omnibus objections on the grounds set forth in the Bankruptcy Rules as well as additional grounds.

When we filed this motion we were somewhat surprised but, as the docket reflects, received a number of calls and concerns. And we worked with many of the parties that are very familiar to this Court in these cases to try and reach an accommodation and resolve any concerns. And, really, if I was to summarize, I think many of the concerns stemmed from a concern or wanting to assure that no one was going to be essentially playing a game of Gotcha with claimants. And as Your Honor is aware, that's not the way these debtors have conducted themselves, nor intend to conduct themselves.

So in an effort to assuage concerns, and as reflected in the blacklined order that was filed with our reply yesterday afternoon, we've made a number of really, in our view, clarifications to the order, which helped, I think, avoid a number of objections and led to at least six of the objections subsequently being withdrawn as well.

And the clarifications, first of all, go to the fact that nothing in the motion, the proposed order or the notice was or is intended to change the evidentiary burdens with respect to proofs of claims, as those burdens are established by the Rules and case law. Nothing in the motion or the proposed order is meant to or intended to or will prejudice any counterparty's rights to discovery under the applicable Bankruptcy Rules, or to use documentation obtained or located in discovery subsequent to the filing of a response to a claim objection in a contested matter over a claim.

Specific modifications to the additional permitted grounds included that if the debtors were to interpose colloquially what's referred to as a books-and-records objection, we would of course, as is routine and as was the intent, include the amount of such claim as reflected in the debtors' books and records. Similarly, if we interposed an objection that the debtors had no liability for a given claim, we would include the legal basis for such objection.

A number of objections also went to the response time

by which parties had to respond to a claims objection. The Rules require that a hearing on a claims objection be set no sooner than thirty days after the objection has been filed, but do not set out the response timetable. We proposed, in the motion, to establish a twenty-one day response deadline. And after speaking to many of the parties, we have revised that to a thirty-day response deadline.

With those modifications and representations, we were able to avoid many objections and resolve a number of objections. There remain, I believe, ten outstanding objections, as reflected in the amended agenda letter.

Your Honor, because of the robust calendar this morning and the need to adjourn this matter to this afternoon, we had a bit of a conflict with some of the parties that objected and that had hoped to be heard by the Court but had other conflicts. And in order to accommodate them, I think we've reached an agreement, with all of the remaining objectors, that would permit this Court to enter the proposed order.

And as to the ten remaining objections, those in essence would be carried to the February 10th hearing, meaning that the objections as filed are on the record, all of the parties' rights as reflected and objections as reflected in what they filed are preserved, and until a further order of this Court or resolution between the parties, the debtors would

not object under the additional grounds with respect to any claims filed by those ten objectors.

But as to the universe of clams filed against the debtors, excepting those filed by these ten objectors, we would be able to proceed on all of the grounds and in the framework set forth in the revised proposed order.

THE COURT: If I understand what you have just said, as to the ten objectors, this order to be entered today, without objection, will have no application, but it's only as to these objectors. And if the objectors are successful, and this is really my point, at the next hearing in persuading me that they're right, does that mean that there'll be an amended order that will apply to everybody, or simply an amended order that will apply as to them?

MR. WAISMAN: It would be an amended order that would apply to them and them only. And the order that would be entered today would, from today forward, apply to all other claims that have been filed.

THE COURT: All right, well, that's fine, although I'm going to reserve the right to amend the order that's entered today if one of the objectors that I haven't yet heard from is particularly eloquent and capable of demonstrating that the order that has been entered includes some anomalies that should be fixed for the benefit of all, not just for their client.

MR. WAISMAN: Okay. That puts us in a bit of an

awkward situation, Your Honor. The debtors were prepared to proceed today, and in fact have omnibus objections prepared, because we are eager to get the claims objection process underway.

THE COURT: It won't affect anything --

MR. WAISMAN: It was an accommodation --

THE COURT: It won't affect anything that's been started. I view this phase of your motion as administrative in nature and expanding, as is permissible, the scope of omnibus objections, both as to the number of those objections from 100 to 500 and as to the categories of claims that can be subject to broad-based objection. I also consider that the notice procedures that you have outlined in your motion, providing particularized and targeted notice to individual claimants, represents, if anything, an improvement over what has become standard practice in providing omnibus objections to claimants who then have to come through fairly thick documents to figure out where in the document their claims are addressed.

So I don't have any problem with the procedures, as I understand them, that are currently the subject of the order you proposed. I'm simply suggesting that, from a prospective perspective, if it turns out that there is some adjustment that an objector is able to persuade me should be made, it won't just be in my view something that will apply as to that single objector but something that should have classwide application.

MR. WAISMAN: Understood, Your Honor. I guess, two clarifying points: First, and not in the nature of an argument to the Court but perhaps a plea to the remaining objectors, as Your Honor just noted, we actually spent a great deal of time and tried to make sure that the notice to be provided as to objections would be particularized. In essence, we would proceed by omnibus objection, but really it would be as if we were filing one-off objections. And given that we could file those one-off objections on our additional permitted grounds if it was a one-off as opposed to an omnibus, and we're providing personalized notice, you know, really the relief requested is not such a far stretch, putting aside the routine nature of the relief.

But we reserve that to February 10th as to the objections that are remaining on the docket, and would ask the Court enter the order as revised and set forth in our reply last night.

As Your Honor may have noticed, the entire section relating to settlement procedures was struck. We are working -- continue to work with the creditors' committee; we had together done a great deal of work leading up to the filing of the motion and subsequent. But there are a few areas that we still wanted to work on cooperatively and thought better to take the time and try to come back on a consensual basis as to that portion of the order as well on February 10th.

THE COURT: That's fine. Let me just inquire if there's anybody in the courtroom who objects to the entry of this order in the form that it has been revised.

(No response)

THE COURT: There's no objection. I'll -- I will enter the --

MS. HOLLEMAN: Your Honor, forgive me. On the telephone speaking, Pamela Holleman, Sullivan & Worcester, for the Finnish programs securities noteholders.

I just wanted to ask a point of clarification as I am not in the courtroom and have not had the discussion with the debtors with regards to outstanding objections being preserved. And I just wanted to confirm that we are of record and that the Finnish programs securities noteholders' objection likewise is carried forward to February 10th. Is that correct?

MR. WAISMAN: Objection on the docket, 6490, is preserved and carries to February 10th.

MS. HOLLEMAN: Thank you.

THE COURT: That's a pretty amazing display of recall of the docket.

Okay, I guess we're done.

MR. WAISMAN: We are adjourned, Your Honor.

THE COURT: Thank you, we're adjourned.

(Proceedings concluded at 3:20 p.m.)

I N D E X

R U L I N G S

I N D E X

(continued)

R U L I N G S

I N D E X

(continued)

R U L I N G S

C E R T I F I C A T I O N

I, Esther Accardi, certify that the foregoing transcript is a true and accurate record of the proceedings.

Esther Accardi

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Date: January 14, 2010